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No.

In the

Supreme Court of the United States

October Term, 1983

SIBLEY, LINDSAY & CURR CO., A DIVISION OF ASSOCIATED DRY GOODS CORPORATION,

Petitioner,

v.

BAKERY, CONFECTIONERY & TOBACCO WORKERS INTERNATIONAL UNION OF AMERICA, AFL-CIO,

AND

BAKERY & CONFECTIONERY UNION & INDUSTRY INTERNATIONAL PENSION FUND, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Does the retroactive imposition of substantial, and in some cases devastating, "withdrawal liability" under the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), 29 U.S.C. §1381 *et seq.*, upon employers who withdrew from multiemployer pension plans prior to the MPPAA's enactment violate the due process clause of the fifth amendment?

2. Is the MPPAA unconstitutionally vague?

3. Does the MPPAA violate the due process clause of the fifth amendment by vesting the determination of a withdrawing employer's liability in a biased tribunal with a substantial pecuniary interest in that determination?

4. Does the MPPAA violate a withdrawing employer's due process right to a hearing prior to the appropriation of its property?

5. Does the MPPAA's compulsory arbitration requirement violate a withdrawing employer's rights of access to the courts and trial by jury?

6. Does the MPPAA violate the due process clause of the fifth amendment by impairing the contractual rights of withdrawing employers?

PARTIES INVOLVED

The petitioner, Sibley, Lindsay & Curr Co. ("Sibley's") is a division of Associated Dry Goods Corporation and operates retail department stores in Rochester and other upstate New York cities. Associated Dry Goods Corporation is a corporation organized under the laws of the state of Virginia and maintains its principal place of business at 417 Fifth Avenue, New York, New York.

Respondent, Bakery, Confectionery & Tobacco Workers International Union of America, AFL-CIO ("Union"), is an unincorporated association with its principal place of business at 10401 Connecticut Avenue, Kensington, Maryland. Respondent Bakery & Confectionery Union & Industry International Pension Fund ("Fund") is a multiemployer pension plan within the meaning of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§1002(37)(A), 1301(a)(3), as amended by the MPPAA, 29 U.S.C. §1381 *et seq.* The Fund's principal place of business is located at 10401 Connecticut Avenue, Kensington, Maryland.

In the proceedings before the United States Court of Appeals for the Second Circuit, an appeal from the decision of the Honorable Michael A. Telesca of the United States District Court for the Western District of New York in *Sibley, Lindsay & Curr Co. v. Bakery Workers International Union,* 566 F. Supp. 32 (W.D.N.Y. 1983) was consolidated with an appeal from the decision of the Honorable John E. Sprizzo of the United States District Court for the Southern District of New York in *Textile Workers Pension Fund v. Standard Dye & Finishing Co., Inc.,* 549 F. Supp. 404 (S.D.N.Y. 1982). Textile Workers Pension Fund is a multiemployer pension plan trust with its principal place of business at 99 University Place, New York, New York. Standard Dye & Finishing Co., Inc. was a corporation organized under the laws of the state of New Jersey and had its principal place of business at Patterson, New Jersey. Upon information and belief, Standard Dye & Finishing Co., Inc. was dissolved in 1982.

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BAKERY & CONFECTIONERY UNION & INDUSTRY INTERNATIONAL PENSION FUND, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Sibley, Lindsay & Curr Co., requests that a writ of certiorari issue to review the judgment of United States Court of Appeals for the Second Circuit entered January 9, 1984.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported as *Textile Workers Pension Fund v. Standard Dye & Finishing Co.*, 725 F.2d 843 (2d Cir. 1984). The opinion of the United States District Court for the Western District of New York is reported as *Sibley, Lindsay & Curr Co. v. Bakery Confectionery & Tobacco Workers International Union*, 566 F. Supp. 32 (W.D.N.Y. 1983). Both decisions are reproduced in Appendix A.

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was entered on January 9, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). The jurisdiction of the district court was invoked under 28 U.S.C. §1331.

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions directly involved are the due process clause of the fifth amendment and the jury trial clause of the seventh amendment. Additionally, petitioner relies by analogy on the principles underlying the ex post facto and bill of attainder provisions of article I, section 9, clause 3, and the impairment of contracts clause of article I, section 10, clause 1, to the extent that these provisions inform the meaning of the due process clause of the fifth amendment. The relevant constitutional provisions are reproduced in Appendix B.

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved are the withdrawal liability provisions of the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), 94 Stat. 1208, *et seq.*, which

amended the Employee Retirement Income Security Act of 1974 ("ERISA"), 88 Stat. 829, *et seq.* The relevant MPPAA provisions are reproduced in Appendix C. The MPPAA provisions are otherwise set forth at 29 U.S.C. §1381, *et seq.* Section 2403(a) of Title 28 of the United States Code may apply.

STATEMENT OF THE CASE

Sibley's is a division of Associated Dry Goods Corporation and operates retail department stores in Rochester, New York and other upstate New York cities. For many years prior to May 31, 1980, Sibley's operated a bakery at its Main Street, Rochester store. Sibley's has been assessed liability for its withdrawal during the "window period" between the MPPAA's enactment and its retroactive effective date from the pension fund covering its bakery employees.

The retroactive imposition of withdrawal liability is particularly harsh and oppressive in Sibley's case. Prior to the closing of its bakery (the act precipitating withdrawal from the Fund), Sibley's negotiated an agreement with the Union which specified the entire obligations of the parties under their collective bargaining agreements upon the closing of the bakery (the "bakery closing agreement"). Significantly, Sibley's prior obligation to participate in the Fund was an obligation arising solely from collective bargaining negotiations and limited to the specific provisions of the collective bargaining agreement. In negotiating the bakery closing agreement, Sibley's justifiably relied on the then existing provisions of ERISA which would have imposed liability upon Sibley's only if the Fund terminated within five years, 29 U.S.C §1364(a), and which greatly limited the amount of Sibley's contingent liability, 29 U.S.C. §§1362(b)(2), 1364.

The existence of this negotiated agreement limiting Sibley's obligations upon the closing of its bakery sets Sibley's apart from R.A. Gray & Co., the employer challenging the MPPAA as applied retroactively in a case presently before this Court,

Pension Benefit Guaranty Corp. v. R. A. Gray & Co., Nos. 83-245, 83-291 (probable jurisdiction noted October 17, 1983). The MPPAA completely abrogated Sibley's contractual rights under the bakery closing agreement. The hardship imposed upon Sibley's through the retroactive application of the MPPAA is qualitatively different and much more severe than that suffered by other employers, such as R.A. Gray & Co., who withdrew from multiemployer pension plans prior to the MPPAA's enactment. A decision by this Court in *Pension Benefit Guaranty Corp. v. R.A. Gray & Co., supra,* therefore, will not determine whether the MPPAA as applied retroactively to Sibley's is constitutional.

At all relevant times, the Union represented Sibley's bakery employees for purposes of collective bargaining. Pursuant to contracts negotiated with the Union, Sibley's contributed to the Fund. Sibley's never bargained to provide specific pension benefits to its former employees. Rather, Sibley's and the Union agreed that Sibley's contributions to the Fund were to be at a fixed rate, a certain sum for each hour worked by bakery employees.

Sibley's had no control in the management of the Fund. The Fund's trustees were responsible for establishing and funding pension benefit levels, and Sibley's never assumed liability should the Fund be unable to maintain a certain level of benefits. Sibley's contributions were not related to the level of pension benefits promised by the Fund. Its sole obligation was to pay the Fund a specified amount per hour worked by each covered employee. Pursuant to its collective bargaining agreements, Sibley's, in the ten years prior to 1980, paid the Fund $445,854.00 on behalf of its bakery employees.

Financial losses attributable to its bakery operation compelled Sibley's to close the operation. On May 31, 1980, Sibley's closed the bakery and terminated the employment of forty-three bakery workers. Prior to the closing date, Sibley's and the Union negotiated an agreement which fixed Sibley's obligations under its col-

lective bargaining agreement upon the bakery closing. Sibley's duty to participate in the Fund arose under its collective bargaining agreement with the Union. The bakery closing agreement required Sibley's to pay its bakery employees for all earned vacation days and all unused personal holidays and to pay an additional sum to each employee as severance pay. Sibley's collective bargaining agreement with the Union required it to make contributions to the Fund with respect to hours for which pay was received by bakery employees under the bakery closing agreement. Sibley's and the Union expressly agreed that the bakery closing agreement set forth all of Sibley's obligations under its collective bargaining agreement with the Union upon the closing of the bakery.

Sibley's completely performed its contractual obligations. It paid its employees for their earned vacation days and unused personal holidays, and it awarded each employee severance pay. On June 3, 1980, Sibley's paid $3,391.36 to the Fund as its contribution for work performed by bakery employees during the month of May, 1980. On July 10, 1980, Sibley's paid the Fund $2,829.12 as its contribution based on the vacation pay paid its former employees under the bakery closing agreement. On August 1, 1980, Sibley's paid $2,803.20 to the Fund as its contribution based on the severance pay paid employees under the bakery closing agreement. Each of these payments represented money paid for, or on account of, services performed prior to June 1, 1980. In a letter dated August 29, 1980, the Fund notified Sibley's that its participation in the Fund had terminated on the date the bakery closed, May 31, 1980.

At the time Sibley's bakery closed, the Employee Retirement Income Security Act ("ERISA") delineated Sibley's potential liability for withdrawal from the Fund. ERISA imposed no withdrawal liability on Sibley's unless the Fund were to terminate within five years of Sibley's withdrawal, 29 U.S.C. §1364(a), and limited Sibley's liability to thirty percent of its net worth. 29 U.S.C. §§1362(b)(2). Under ERISA, the amount of Sibley's po-

tential withdrawal liability would have decreased proportionately each year during the five-year period following withdrawal. 29 U.S.C. §1364(b).

On September 26, 1980, nearly four months after Sibley's closed its bakery, Congress enacted the MPPAA. The MPPAA radically amended ERISA and retroactively imposed withdrawal liability upon any employer who completely or partially withdrew from a multiemployer pension plan on or after April 29, 1980. 29 U.S.C. §§1381, 1461(e)(2). The MPPAA's retroactive effective date was changed on a number of occasions, and the date ultimately adopted, April 29, 1980, was not fixed in the proposed legislation until June, 1980.

The Fund notified Sibley's for the first time by a letter dated May 11, 1981 that it had computed Sibley's withdrawal liability to be $315,927.00. Sibley's alleged withdrawal liability is its allocable share of the Fund's unfunded vested benefits as calculated by the Fund's trustees. 29 U.S.C. §§1381, 1391. The Fund's "unfunded vested benefit liability" is the difference between the value of its assets and its vested benefit liability. 29 U.S.C. §1393(c).

A particular multiemployer fund's unfunded vested benefit liability results from a variety of factors outside the control of employers such as Sibley's including: 1) the separation of the benefit setting function (the sole province of the fund trustees) from the contribution setting function (collective bargaining between unions and employers); 2) poor management of a fund's assets and imprudent benefit increases; 3) ERISA's mandatory modification of the vesting requirements of many multiemployer pension plans; 4) the granting by unions of past service credits to encourage union membership by enlarging the pension benefits of prospective members; and 5) decreases in the value of a fund's assets due to inflation, interest rate fluctuation and other economic factors. Sibley's and other employers are not responsible for the underfunded status of many pension funds, and the burden which

the MPPAA retroactively imposed upon them is harsh and inequitable. Sibley's alleged withdrawal liability is three-quarters of its total contribution to the Fund for the ten years prior to its withdrawal. The bakery closing agreement was signed almost four months prior to the MPPAA's enactment. At that time Sibley's relied upon existing law, and did not, indeed, could not have anticipated the additional penalty of withdrawal liability.

Sibley's could not have predicted what the final version of the MPPAA would provide, whether it would be passed, or when it would become effective. In early July, 1980, the House and Senate remained at odds over major portions of the new legislation. In the Senate alone, the bill was changed no fewer than 335 times. (126 Cong. Rec. S10167 [daily ed. July 29, 1980]). The Senate did not approve the original House bill, H.R. 3904, 96th. Cong., 1st Sess. (1979), until July 29, 1980 (two months after Sibley's closed its bakery) and even then attached certain riders and amendments which proved unacceptable to the House. (126 Cong. Rec. S10169 [daily ed. July 29, 1980]). The House reconsidered, a conference report was issued, and final approval of the conference report occurred September 19, 1980. (126 Cong. Rec. H9180 [daily ed. September 19, 1980]). The MPPAA was enacted on September 26, 1980, more than seventeen months after its introduction. During these seventeen months, the most experienced legislative observer could not have predicted the passage, final substance, form or effective date of the MPPAA.

In June, 1982, Sibley's commenced an action in the United States District Court for the Western District of New York seeking a declaration that the MPPAA was unconstitutional and an injunction restraining the Fund and the Union from taking any action to collect Sibley's alleged withdrawal liability. Jurisdiction of the district court was based on 28 U.S.C. §1331. Sibley's motion for a preliminary injunction was converted to a motion for summary judgment. On March 15, 1983, the Hon.

Michael A. Telesca granted Sibley's Motion for summary judgment, holding that the retroactive application of the MPPAA violated Sibley's right to due process of law guaranteed by the fifth amendment to the United States Constitution. *Sibley, Lindsay & Curr Co. v. Bakery, Confectionery & Tobacco Workers*, 566 F. Supp. 32 (W.D.N.Y. 1983). On January 9, 1984, the United States Court of Appeals for the Second Circuit reversed District Judge Telesca's decision and upheld the MPPAA's constitutionality. *Textile Workers Pension Fund v. Standard Dye & Finishing Co.*, 725 F.2d 843 (2d Cir. 1984).

I. THE WRIT SHOULD ISSUE TO RESOLVE THE CONFLICT AMONG THE COURTS OF APPEALS REGARDING THE CONSTITUTIONALITY OF RETROACTIVELY APPLYING THE MPPAA'S "WITHDRAWAL LIABILITY" PROVISIONS TO PRE-ENACTMENT WITHDRAWALS.

Several compelling reasons exist for this Court to issue a writ of certiorari to review of the decision of the United States Court of Appeals for the Second Circuit. First, the writ should issue to resolve a conflict among the courts of appeals regarding the constitutionality of the MPPAA as applied retroactively to employers who withdrew from multiemployer pension plans prior to the MPPAA's enactment. Second, the writ should issue to resolve the confusion among the courts of appeals regarding the proper standard for reviewing retroactive federal legislation.

Should this Court resolve these issues in deciding *Pension Benefit Guaranty Co. p. v. R. A. Gray & Co.*, Nos. 83-245, 83-291 (probable jurisdiction noted Oct. 17, 1983), a third, and even more compelling, reason remains to issue the writ. Sibley's, unlike R. A. Gray & Co., negotiated an agreement with the Union limiting its obligations under its collective bargaining agreement upon the closing of its bakery, the act precipitating its withdrawal from the Fund. In negotiating this

agreement, Sibley's necessarily and justifiably relied on the then existing state of the law which imposed liability only if the Fund terminated within five years. It is the existence of this negotiated agreement limiting Sibley's obligations upon the closing of its bakery which sets Sibley's apart from R. A. Gray & Co. and makes the retroactive imposition of withdrawal liability upon Sibley's particularly harsh and oppressive. The writ should issue to determine the constitutionality of the MPPAA as applied retroactively to Sibley's.

The constitutionality of the MPPAA has been the subject of extensive litigation and has been challenged on several grounds, most notably that its retroactive application to employers who withdrew from multiemployer pension plans prior to the MPPAA's enactment constitutes a denial of due process of law. The federal courts, including the Courts of Appeals for the Second, Fourth, Seventh and Ninth Circuits, are sharply divided in their assessments of the constitutionality of the MPPAA as applied retroactively. *Compare, e.g., Shelter Framing Corp. v. Pension Benefit Guaranty Corp.*, 705 F.2d 1502 (9th Cir. 1983), *petition for cert. filed*, 52 U.S.L.W. 3268 (Sept. 24, 1983) (unconstitutional) *with Peick v. Pension Benefit Guaranty Corp.*, No. 82-2081 (7th Cir. Dec. 19, 1983) (constitutional); *Republic Industries, Inc. v. Teamsters Joint Council No. 83 of Virginia Pension Fund*, 718 F.2d 628 (4th Cir.), *petition for cert. filed*, 52 U.S.L.W. 3293 (Sept. 29, 1983) (constitutional).

The conflict among the courts of appeals regarding the MPPAA's constitutionality alone is sufficient reason for this Court to issue the writ. In addition, the writ should issue to clarify the confusion among the lower federal courts regarding the proper standard to be applied in reviewing retroactive federal legislation. The Second Circuit, relying on *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976), determined that retroactive federal legislation carries a presumption of constitutionality and that to rebut this presumption the person alleging a due process violation must establish that the legislature has

acted in an abitrary and irrational manner. *Textile Workers Pension Fund v. Standard Dye & Finishing Co.*, 725 F.2d 843, 849 (2d Cir. 1984). The Seventh Circuit, relying on *United States Trust Co. v. New Jersey*, 431 U.S. 1, 17 n.13 (1976) and *Welch v. Henry*, 305 U.S. 134, 147 (1938), held that retroactive federal legislation must be tested under the traditional due process "rationality" test with particluar attention to whether the retroactive effects are "particularly harsh and oppressive." *Peick v. Pension Benefit Guaranty Corp.*, No. 82-2081, slip op. at 38-39 (7th Cir. Dec. 19, 1983). The Fourth and the Ninth Circuits applied the four-factor test first articulated by the Seventh Circuit in *Nachman v. Pension Benefit Guaranty Corp.*, 592 F.2d 947 (7th Cir.), *cert. denied on constitutional question*, 442 U.S. 940 (1979), *aff'd on statutory grounds*, 446 U.S. 359 (1980)[1] to assess the constitutionality of the retroactive application of the MPPAA. The Ninth Circuit declared the retroactive application of the MPPAA to be unconstitutional. *Shelter Framing Corp. v. Pension Benefit Guaranty Corp.*, 705 F.2d 1502 (9th Cir.), *petition for cert. filed*, 52 U.S.L.W. 3268 (Sept. 24, 1983). Applying the same analysis, the Fourth Circuit held the MPPAA to be constitutional in all respects. *Republic Industries v. Teamsters Joint Council No. 83 of Virginia*

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[1] In *Nachman*, the Seventh Circuit articulated four factors to consider in assessing the constitutionality of retroactive federal legislation: (1) the reliance interests of the parties affected; (2) whether the impairment of the private interest is affected in an area previously subjected to regulatory control; (3) the equities of imposing the legislative burden; and (4) the inclusion of statutory provisions designed to limit and moderate the impact of the burdens. *Nachman*, 592 F.2d at 960. This Court declined to review the constitutional question presented in *Nachman*, 442 U.S. 940 (1979), and affirmed the judgment on statutory grounds, 446 U.S. 359 (1980). To the extent that the *Nachman* analysis articulates a more demanding standard of review for retroactive federal legislation than does the traditional due process "rationality" test and provides a well-reasoned framework for assessing the constitutionality of retroactive federal legislation, petitioner advocates its application in the present controversy.

Pension Fund, 718 F.2d 628 (4th Cir.), *petition for cert. filed*, 52 U.S.L.W. 3293 (Sept. 29, 1983).

The confusion among the lower federal courts as to the proper standard for reviewing retroactive federal legislation stems from the failure to distinguish between truly retroactive legislation and prospective legislation with retroactive effects. The truly retroactive law is a rarity in our jurisprudence. Indeed, "there are few principles of our law more ancient, and none more respected, than the cannon which holds that laws are enacted for the future. A legislative pronouncement may not operate on acts which predate its passage." *South East Chicago Commission v. Department of Housing and Urban Development*, 488 F.2d 1119, 1122 (7th Cir. 1973). Retroactive legislation reaches back to attach new rights and duties to already completed transactions. Congress may act retroactively with an exact knowledge of who will benefit and who will suffer from its acts. *Adams Nursing Home of Williamstown v. Matthews*, 548 F.2d 1077, 1080 (1st Cir. 1977). Retroactive legislation undermines the stability of past transactions, destroys the value of the statutory law as a guide to individual conduct, and contravenes the strong common law tradition that a legislature's function is to declare law for the future. *Adams Nursing Home of Williamstown*, 548 F.2d at 1080; *Leedom v. International Brotherhood of Electrical Workers*, 278 F.2d 237, 240 (D.C. Cir. 1960). *See also* Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 Harv. L. Rev. 692 (1960).

Although both retroactive legislation and prospective legislation with retrospective effects invariably impair established rights and expectations, the statute that is retroactively applied also deprives an individual of the knowledge that his act will create a liability and the opportunity to modify his conduct to avoid that liability. The courts of appeals which have upheld the MPPAA's constitutionality have attempted to distinguish precedent of this Court condemning truly retroactive federal legislation.

E.g.. Railroad Retirement Board v. Alton Railroad, 295 U.S. 330 (1935); *Untermyer v. Anderson,* 276 U.S. 440 (1928). These courts have based their decisions on inapposite cases addressing the constitutionality of prospective legislation with limited retrospective impacts, *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976), or involving "retroactive" income tax legislation which really is not retroactive at all because of the "taxable year" concept, *United States v. Darusmont,* 449 U.S. 292 (1981); *United States v. Hudson,* 299 U.S. 498 (1937). Thus, the Second Circuit's reliance on *Republic Industries, Inc. v. Teamsters Joint Counsel,* 718 F.2d 628, 638-39 (4th Cir. 1983) [citing *United States v. Darusmont,* 449 U.S. 292 (1981) and *Usery v. Turner Elkhorn Mining Co.,* 418 U.S. 1 (1976)] was misplaced.

Retroactive legislation is inherently unfair as it deprives an individual of the knowledge that his act will create a liability and the opportunity to modify his conduct to avoid that liability. This Court has not hesitated to strike down legislation whic imposes new duties and liabilities for a completed act — duties and liabilities that were unknown and unknowable at the time of the act. *Railroad Retirement Board v. Alton Railroad,* 295 U.S. 330 (1935); *Untermyer v. Anderson,* 276 U.S. 440 (128). The patent unfairness inherent in truly retroactive legislation separates it from prospective legislation with retrospective effects and from retroactive income tax legislation. Assuming that the traditional due process "rationality" standard is appropriate for prospective legislation having retrospective effects or "retroactive" income tax legislation, it is erroneous to apply that standard to statutes, like the MPPAA, which impose a new liability for conduct for which no liability was imposed under the law in effect at the time of the conduct.

In forging the proper standard for reviewing retroactive federal legislation, the Court should consider its decisions applying the contract clause to retroactive state legislation, insofar as these decisions inform the due process limitations on retroactive

federal legislation. Although the lower federal courts, without exception, have recognized that the contracts clause applies only to state legislation, the courts have also recognized that the due process clause of the fifth amendment imposes comparable, if not identical, restraints on retroactive federal legislation. *See, e.g., Northwestern Life Ins. Co. v. Tahoe Regional Planning Agency,* 632 F.2d 104 (9th Cir. 1980). Contrary to the arguments advanced by the proponents of the MPPAA, the mere absence of an express constitutional limitation on retroactive federal legislation does not give Congress unbridled discretion to reach back in time and impose new and substantial duties and liabilities for past conduct. Fundamental notions of fairness, firmly embodied in the due process jurisprudence of this Court, stand as a bulwark for individual rights and liberties against such legislative overreaching. Although the powers of the state and federal government are not co-extensive, the constitution must stand to protect individual rights and liberties from such legislative encroachments, whether state or federal.

Should this Court decide *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.,* Nos. 83-245, 83-291 (probable jurisdiction noted Oct. 17, 1983) and resolve the conflict among the courts of appeals regarding the facial validity of the MPPAA as applied retroactively and the proper standard for reviewing retroactive federal legislation, the writ should issue nevertheless to consider the constitutionality of the MPPAA as applied retroactively to Sibley's. Relying on the then existing state of the law, Sibley's negotiated an agreement with the Union limiting its obligations under its collective bargaining agreement upon the bakery closing. Sibley's obligations to the Fund arose only under its collective bargaining agreement with the Union. This bakery closing agreement sets Sibley's apart from R.A. Gray & Co. and makes the retroactive imposition of withdrawal liability upon Sibley's distinctly harsh and oppressive.

The constitutional right to know and rely upon existing law

in conducting one's affairs is firmly established. It is expressly recognized as to criminal legislation in the ex post facto clause and applies to civil legislation by way of the due process and contract clauses. This Court has recognized the fundamental value of the law as a guide to conduct by striking down vague laws which fail to "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Grayned v. City of Rockford,* 408 U.S. 103, 108 (1972).

Sibley's experience demonstrates the devastating effect which retroactive legislation such as the MPPAA has on predictability and reliance. Prior to closing its bakery, Sibley's negotiated an agreement which all parties agreed delineated the full extent of Sibley's responsibilities under its collective bargaining agreement upon the bakery closing. Sibley's duties to the Fund arose solely from its collective bargaining agreement with the Union. In negotiating the bakery closing agreement, Sibley's necessarily and justifiably relied on the then existing state of the law which would have imposed withdrawal liability only if the Fund terminated within the next five years. Long after Sibley's had fulfilled its contractual obligations under its bakery closing and collective bargaining agreements, Congress enacted the MPPAA. The MPPAA grossly distorted Sibley's obligations to the Fund, the Union and former bakery employees by superimposing sudden, unanticipated and substantial retroactive obligations upon Sibley's, substantially beyond the terms of its agreements with the Union. Moreover, Sibley's was denied any opportunity to plan its conduct in light of the new legislation which did not become effective until nearly four months after the bakery closing.

The Ninth Circuit's decision declaring the MPPAA unconstitutional reflects its belief that one has a right to rely on the law in effect at the time he acts and is not required to guess what the law will become. *Shelter Framing,* 705 F.2d at 1511. The Second, Fourth and Seventh Circuits, however, have applied a "constructive notice" theory which holds every citizen responsible for the

substance of proposed legislation from the time it is introduced. *Textile Workers Pension Fund v. Standard Dye & Finishing Co.*, 725 F.2d 843, 850 (2d Cir. 1984); *Peick v. Pension Benefit Guaranty Corp.*, NO. 82-2081, slip op. at 39-40 (7th Cir. Dec. 19, 1983); *Republic Industries, Inc. v. Teamsters Joint Council No 83 of Virginia Pension Fund*, 718 F.2d, 628, 638 (4th Cir. 1983). This "constructive notice" theory is contrary to the legislative process mandated by the United States Constitution and common sense. As Judge Telesca noted, "forecasting congressional action (or lack of action) is akin to forecasting the weather or the stock market. There are simply too many unpredictable variables involved." *Sibley, Lindsay & Curr Co. v. Bakery, Confectionery Tobacco Workers*, 566 F. Supp. 32, 35-36 (W.D.N.Y. 1983).

If the law is to retain any value as a guide to conduct, this Court should review statutes which are retroactive in application under a standard that permits Congress to legislate retroactively only upon a showing of extraordinary justification. Furthermore, where, as here, the retroactive legislation is particularly harsh and oppressive when applied to particular persons or entities, retroactive legislation should survive scrutiny under the due process clause of the fifth amendment only upon a showing of compelling circumstances. As no showing of extraordinary or compelling circumstances can be made in the present case, the MPPAA on its face, and as applied to Sibley's, violated the due process clause of the fifth amendment. This Court should exercise its certiorari jurisdiction and review the judgment of the Second Circuit to resolve the conflict among the courts of appeals regarding the MPPAA's constitutionality, to clarify the proper standard for reviewing retroactive federal legislation, and to consider the constitutionality of the MPPAA as applied retroactively to Sibley's.

II. THE WRIT SHOULD ISSUE TO REVIEW THE COURT OF APPEALS' DECISION UPHOLDING THE CONSTITUTIONALITY OF THE MPPAA'S PROVISIONS REGARDING THE ASSESSMENT, COLLECTION AND ADJUDICATION OF "WITHDRAWAL LIABILITY", BECAUSE THAT DECISION CONTRAVENES ESTABLISHED PRECEDENT OF THIS COURT.

The MPPAA authorizes an inherently biased tribunal — one that is statutorily bound to advance only the interests of a plan's beneficiaries — to calculate, assess and collect an employer's withdrawal liability without affording that employer a hearing prior to the time the withdrawal liability is due and collectible. The MPPAA then exacerbates this violation of the employer's right to due process by precluding any meaningful review of the plan trustees' determination by an impartial arbitrator or the courts. The MPPAA's dispute resolution procedures are unprecedented and violate the withdrawing employer's constitutional rights secured by the fifth and seventh amendments to the United States Constitution. The decision of the United States Court of Appeals for the Second Circuit upholding the constitutionality of the MPPAA's dispute resolution procedures contravenes established precedent of this Court and should be reversed.

A. The MPPAA Is Unconstitutionally Vague and Cannot Be Rationally, Consistently and Fairly Applied.

The MPPAA on its face, and as applied to Sibley's, affords no intelligible basis upon which withdrawal liability can be ascertained or measured. *See* 29 U.S.C. §§1381, 1391. The MPPAA provides four alternative methods by which a fund's trustees may calculate the amount of withdrawal liability due. 29 U.S.C.

§1391. For each of the alternative methods, a fund is authorized to calculate a withdrawing employer's liability by using

> actuarial assumptions and methods which, in the aggregate, are reasonable (taking into account the experience of the plan and reasonable expectations) and which, in combination, call for the actuary's best estimate of anticipated experience under the plan. 29 U.S.C. §1393(a)(1).

Additionally, the plan's actuary, "in the absence of complete data," may use "data secured by a sampling which can reasonably be expected to be representative of the status of the entire plan." 29 U.S.C. §1393 (b).

The actuarial assumptions employed by the fund's trustees determine the extent of a withdrawing employer's liability. Indeed, a minor variation in the actuarial assumptions employed can have a tremendous impact on the calculation of a withdrawing employer's liability. *See* Caflisch & Fay, *Employer Withdrawal Liability Under the Multiemployer Pension Plan Amendments Act of 1980,* 9 Pens. Rep. (BNA) 182, 188 (Feb. 8, 1982). The power of the plan's trustees to make actuarial assumptions, however, is circumscribed only by the requirement that those assumptions "in the aggregate, are reasonable" and "in combination, offer the actuary's best estimate of anticipated experience under the plan." The MPPAA's "limitations" on the plan trustees' ability to make actuarial assumptions are patently vague and, in effect, confer unbridled discretion upon a plan's trustees to make actuarial assumptions in computing a withdrawing employer's liability. As the MPPAA cannot be fairly and consistently applied, it is void by virtue of its vagueness.

A statute is unconstitutionally vague if men of ordinary intelligence must guess as to its meaning and differ as to its application. *Baggett v. Bullit,* 377 U.S. 360, 367 (1964). In other words, a statute is unconstitutionally vague if it fails to give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, or if the language permits men of ordinary intelligence to

differ with regard to the proper interpretation and application of the statutory language. *Grayned v. City of Rockford,* 408 U.S. 104, 108-109 (1972).

Men of ordinary intelligence surely must guess as to the meaning of the statutory language describing the method of computing "withdrawal liability." Language such as "actuarial assumptions and methods which, in the aggregate, are reasonable," "the actuary's best estimate of anticipated experience under the plan," and "in the absence of complete data" defies consistent and fair application. Indeed, the MPPAA's provisions regarding the computation of "withdrawal liability" are so vague as to be standardless and permit assessments of withdrawal liability entirely unrelated to a particular plan's financial status.

In dismissing Sibley's vagueness challenge, the Second Circuit relied on this Court's decision in *Hoffman Estates v. Flipside, Hoffman Estates,* 455 U.S. 489 (1982) for the proposition that economic regulation is subject to a less stringent vagueness test. The Second Circuit, however, failed to discuss or even mention the rationale underlying this Court's decision to treat criminal and civil legislation differently when challenged on vagueness grounds.

> [E]conomic regulation is subject to a less strict vagueness test because its subject matter is often more narrow, and because businesses, which face economic demands to plan behavior carefully, can be expected to consult relevant legislation in advance of action. Indeed, the regulated enterprise may have the ability to clarify the meaning of the regulation by its own inquiry, or by resort to an administrative process. The court has also expressed greater tolerance of enactments with civil rather than criminal penalties because the consequences of inprecision are qualitatively less severe.

Hoffman Estates v. Flipside, Hoffman Estates, 455 U.S. 489, 498-99 (1982).

None of the reasons which this Court articulated for subject-

ing civil legislation to a less strict vagueness test apply to the MPPAA. First, the MPPAA's subject matter is not narrowly confined, but instead imposes sweeping and unprecedented liabilities upon employers who withdraw from multiemployer pension plans. Second, employers, such as Sibley's, who withdrew prior to the MPPAA's enactment could not possibly consult relevant legislation in advance of action, as such legislation simply did not exist. Employers who withdraw after the MPPAA's effective date are in little better circumstances, because the MPPAA's language regarding the computation of withdrawal liability is so vague as to be meaningless. Third, withdrawing employers cannot clarify the meaning of the regulation by resort to an administrative process; rather, each multiemployer plan is allowed to interpret and apply the MPPAA's regulations in any manner it chooses. Finally, where minor variations in the actuarial assumptions applied by a plan's trustees can produce effects in a withdrawing employer's liability reaching millions of dollars, it cannot be said that the consequences of imprecision under the MPPAA are qualitatively less severe than under criminal penalties. Indeed, the staggering liability assessed against some employers has threatened their continued existence. *See Transport Motor Express, Inc. v. Central States, Southeast and Southwest Areas Pension Fund*, 724 F.2d 575 (7th Cir. 1983). Thus, the Second Circuit erred in evaluating the MPPAA under a less stringent vagueness test. Applying the proper vagueness standard, this Court should conclude that the MPPAA's provisions regarding the computation of withdrawal liability defy rational, fair and consistent application and, thus, violate the due process rights of withdrawing employers.

B. The MPPAA Fails To Provide Withdrawing Employers With a Fair Hearing Before an Impartial Tribunal.

The *sine qua non* of due process of law is the right to have one's

interest in life, liberty or property determined by an impartial decisionmaker. *E.g., Tumey v. Ohio*, 273 U.S. 510, 522-23 (1927). Indeed, all other procedural safeguards are rendered meaningless, if the tribunal that adjudicates an individual's rights is biased or possesses an interest in the outcome of the controversy. Thus, this Court has been highly protective of the fundamental constitutional right to an impartial tribunal:

> A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome.

In re Murchison, 349 U.S. 133, 136 (1955).

The MPPAA deprives withdrawing employers of this most basic due process right and empowers every multiemployer pension fund to "be a judge in [its] own case." A withdrawing employer's liability is determined *ex parte* by the fund's trustees who must "discharge [their] duties with respect to a plan solely in the interest of the participants and beneficiaries and . . . for the exclusive purpose of providing benefits to participants and their beneficiaries. . . ." 29 U.S.C. §1104(a)(1).

Although employees and employers are entitled to equal representation on a pension plan's board of trustees, a trustee appointed by an employer must overcome his loyalty to the employer and advance only the interests of the plan's beneficiaries. *NLRB v. Amax Coal Co.*, 453 U.S. 322, 334 (1981). If the due process clause proscribes even the "probability of unfairness," it surely must proscribe a statute which, on its face, mandates a biased decisionmaker and decision.

The decisions of this Court demonstrate that due process is denied where the decisionmaker possesses even an attenuated interest in the outcome of the controversy. In *Ward v. Village of Monroeville*, 409 U.S. 57 (1972), this Court held a state

statute authorizing village mayors to adjudge certain traffic cases to be unconstitutional, because the village's income was enhanced by any fine assessed in such cases. This Court's decision in *Gibson v. Berryhill*, 411 U.S. 564 (1973), demonstrates that due process is denied was there is any possibility that the decisionmaker possesses a pecuniary self-interest in the outcome of the controversy. In that case, this Court concluded that the Alabama State Board of Optometry, composed of optometrists in private practice, was barred from conducting hearings to revoke the licenses of other optometrists, because the revocation of a competing optometrist's license created a greater demand for the services of the board members. The pecuniary self-interest of the plan's trustees naturally compels them to maximize a withdrawing employer's liability. Note, *Trading Fairness for Efficiency: Constitutionality of the Dispute Resolution Procedures of the Multi-employer Pension Plan Amendments Act of 1980*, 71 Geo. L. J. 161, 168-69 (1982) (hereinafter "Trading Fairness for Efficiency"). In any event, the trustees must maximize that liability to fulfill their fiduciary obligations to the plan's beneficiaries. If the due process clause proscribes the rather attenuated pecuniary interest of the Alabama State Board of Optometry, it surely must proscribe the patent and statutorily mandated bias of a pension plan's trustees.

Finally, unlike the statute at issue in *Marshall v. Jerrico, Inc.*, 446 U.S. 238 (1980), the MPPAA does not provide for *de novo* review of the trustees' decisions, the only procedural safeguard that could possibly correct the abuses of an inherently biased decisionmaker. Indeed, the statute precludes any meaningful appellate review, let alone *de novo* review, of the trustees' decisions by severely limiting review of the trustees' initial determination through a system of powerful and irrational presumptions.

Although the Second Circuit correctly noted that a plan's trustees are required to serve the fund impartially (i.e. without regard to whether they were appointed by labor or by manage-

ment) that requirement is of little comfort to withdrawing employers, because it is in the best interest of both employees and employers to maximize a withdrawing employer's liability. *Trading Fairness for Efficiency,* 71 Geo. L. J. 161, 168-69 (1982). Employee representatives want to maximize a withdrawing employer's liability to protect the benefits of the plan beneficiaries, that is, the employees. On the other hand, employers could be expected to maximize a withdrawing employer's liability to minimize their own potential withdrawal liability and perhaps gain a competitive edge by inflicting substantial, and in some cases crippling, liability upon a competitor. The Second Circuit's determination that entrusting the determination of a withdrawing employer's liability to the fund's trustees did not violate the due process clause contravenes the precedent of this Court and must be reversed.

C. The MPPAA Violates Sibley's Fifth Amendment Right To a Hearing Prior To The Appropriation of Its Property.

The due process clause of the fifth amendment requires that any deprivation of life, liberty or property be preceded by notice and opportunity to be heard at a meaningful time and in an meaningful manner. *Armstrong v. Manzo,* 380 U.S. 545, 552 (1965). To be meaningful, the hearing should precede the deprivation. *Hodel v. Virginia Surface Mining & Reclamation Ass'n.*, 452 U.S. 264, 299 (1981). In disputes between private parties, the deprivation of a property right without a pre-seizure hearing is permitted only if stringent procedural safeguards exist to protect the owner's rights. *North Georgia Finishing, Inc. v. Di-Chem. Inc.*, 419 U.S. 601 (1975); *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974); *Fuentes v. Shevin,* 407 U.S. 67 (1972).

The MPPAA fails to provide withdrawing employers with any opportunity to contest the existence and amount of their alleged liability prior to payment. Although a withdrawing employer may submit written comments to the plan's trustees regarding the

calculation of its withdrawal liability, the trustees' *ex parte* determination of liability is not subject to impartial review before payment must be made. Indeed, the MPPAA is devoid of any procedural safeguards designed to protect withdrawing employers from an erroneous deprivation of their property.

In its opinion, the Second Circuit noted that the only private interest affected by the imposition of withdrawal liability is the employer's bank account. Significantly, this Court has determined that no distinction of constitutional dimension exists between a corporation's interest in its bank account and other constitutionally protected interests and has indicated that "it is no more inclined now than [it has] been in the past to distinguish among different kinds of property in applying the due process clause." *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. at 608.

In rejecting Sibley's claim that due process requires a prepayment hearing, the Second Circuit applied the balancing test which this Court articulated in *Matthews v. Eldridge*, 424 U.S. 319 (1976). That balancing test, however, is appropriate to determine what process is due when a governmental agency attempts to deprive an individual of a constitutionally protected interest and does not address the procedural safeguards which the due process clause requires in disputes between private parties. Where, as here, a dispute between private parties involves constitutionally protected interests, this Court has required stringent procedural safeguards to guard against an erroneous deprivation of those interests. *E.g., North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975). The need for strict procedural safeguards is particularly great where, as here, the decisionmaker is inherently biased and possesses a substantial pecuniary interest in the outcome of the controversy. By failing to distinguish between the deprivation of a constitutional interest by a governmental agency, as opposed to a private party, the Second Circuit erred in approving the constitutionality of the MPPAA's dispute resolution process.

D. The MPPAA's Compulsory Arbitration Requirement Violates Sibley's Constitutional Rights of Access to the Courts and Trial By Jury.

Any dispute between a fund's trustees and a withdrawing employer regarding that employer's withdrawal liability must be resolved through arbitration. 28 U.S.C. §1401(a)(1). The arbitrator must presume that the plan's determinations concernning the withdrawal liability are correct unless the employer shows by a preponderance of the evidence that a challenged determination was "unreasonable or clearly erroneous." 29 U.S.C. §1401 (a)(3)(A). Although the arbitrator's decision may be vacated or modified by the federal district courts, the grounds for vacating or modifying an award are very narrow. 9 U.S.C. §§10, 11 (1976) (fraud, corruption, evident partiality or misconduct). *See also Wilko v. Swann*, 346 U.S. 427, 436-37 (1953) (arbitrator's errors of legal interpretation not subject to judicial review). At no point in the MPPAA's dispute resolution process is a withdrawing employer afforded *de novo* review of the plan's determinations, either by a court or an impartial arbitrator. This process denies Sibley's and other withdrawing employers the rights of access to the courts and trial by jury.

The informal procedures which make arbitration well suited for the resolution of certain types of disputes make it a "comparatively inappropriate forum for the final resolution of [statutory] rights." *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 56-60 (1974).

> [T]he fact finding process in arbitration usually is not equivalent to judicial fact finding. The record of the arbitration proceedings is not as complete; the usual rules of evidence do not apply; and rights and procedures common to civil trials, such as discovery, compulsory process, cross-examination, and testimony under oath, are often severely limited or unavailable.

415 U.S. at 57-58.

Arbitrators are not obligated to give reasons for a decision or base that decision on the record before them. *See Berhnardt v. Polygraphic Co.*, 350 U.S. 198, 203-04 (1956). Thus, a statute which compels private disputes to be resolved through arbitration, without affording the opportunity for *de novo* review of the arbitrator's decision by a court of law, violates the due process right to be heard at a meaningful time and in a meaningful manner. *See Trading Fairness for Efficiency*, 71 Geo. L. J. 161, 183-86 (1982) (collecting cases).

The MPPAA's dispute resolution process also denies withdrawing employers their seventh amendment right to have the existence and amount of their alleged withdrawal liability determined by a jury. The right to a jury trial embraces suits to enforce rights created by statute "if the statute creates legal rights and remedies, enforceable in an action for damages in ordinary courts of law." *Curtis v. Loether*, 415 U.S. 189, 194 (1974). Indeed, this Court has concluded that the right to a jury trial extends to all suits which are not of equity or admiralty jurisdiction. *Curtis v. Loether*, 415 U.S. at 193. A withdrawing employer's liability is merely a debt created by statute. Collection of that debt involves a traditional legal remedy — payment of money — to which the seventh amendment right to a jury trial attaches. *Curtis v. Loether*, 415 U.S. at 196-98.

The authorities cited by the Second Circuit can be distinguished. In *Atlas Roofing Co. v. Occupational Safety & Health Review Commission*, 430 U.S. 442 (1977) and *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), fact-finding was vested in a properly constituted administrative agency with special knowledge of the substantive law to be applied. In contrast, the MPPAA vests the fact-finding function in what the Second Circuit referred to as a "specialized tribunal" composed of individuals who possess interests adverse to the withdrawing employer and who cannot claim any expertise or experience which might justify such a delegation. No "functional justification" inheres in the MPPAA's dispute resolution process sufficient to deny Sib-

ley's and other withdrawing employers the right to have the existence and amount of their alleged withdrawal liability determined by a jury.

The presumptions of correctness which attach to a particular fund's determinations preclude independent and meaningful review of those determinations by an arbitrator or the courts and, therefore, cannot withstand judicial scrutiny under the fifth amendment. First, delegating the power to make presumptively valid (and potentially conclusive) legal and factual determinations to an interested party is unconstitutional. *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1935). Second, a legislative presumption is valid only if a "rational connection" exists between the fact demonstrated (a pension fund's factual determination) and the fact presumed (its correctness). *See Edelberg v. Illinois Racing Board,* 540 F.2d 279 (7th Cir. 1976).

Arming the fund's factual and legal determinations with a presumption of correctness is irrational and arbitrary. Unlike an administrative agency, a plan's trustees possess no expertise which might justify such a presumption. More importantly, the presumptions of correctness which attach to a plan's determinations effectively preclude any independent assessment of a withdrawing employer's liability by an impartial arbitrator, for "it is plain that where the burden of proof lies may be decisive of the outcome."*Armstrong v. Manzo,* 380 U.S. 545, 551 (1964). Indeed, "[a] hearing that affords the employer no meaningful opportunity to present its position, because the adjudicator lacks authority to assess the parties' claim independently, is little better than no hearing at all." *Trading Fairness for Efficiency,* 71 Geo. L.J. at 184.

The Second Circuit, however, could perceive no unfairness in making the fund's determination presumptively correct, noting that, pursuant to 29 U.S.C. §1391, an employer's withdrawal liability must be computed according to certain detailed and explicit statutory guides. The plan trustees, however, are given broad dis-

cretion to make the actuarial assumptions which underlie, and ultimately determine, a withdrawing employer's liability. Because a plan's actuarial assumptions, as well as its mechanical computations, are presumed to be correct, Sibley's and other withdrawing employers are denied an independent assessment of the plan's determinations by the courts or an impartial arbitrator.

E. The MPPAA Impairs Sibley's Contractual Rights.

Retroactive application of the MPPAA's withdrawal liability provisions impairs Sibley's contractual rights under its bakery closing and collective bargaining agreements with the Union. These agreements limited and defined Sibley's liability upon the closing of its bakery.

> Contracts enable individuals to order their personal and business affairs according to their particular needs and interests. Once arranged, those rights and obligations are binding under the law, and the parties are entitled to rely on them.

Allied Structural Steel, Co. v. Spannaus, 438 U.S. 234, 245 (1978). A statute which alters contractual rights and obligations by retroactively imposing a burden never contemplated by either party is unconstitutional. *Railroad Retirement Board v. Alton Railroad Co.,* 295 U.S. 330 (1935). *See also Allied Structural Steel Co. v. Spannaus,* 438 U.S. 234 (1978).

In *Railroad Retirement Board v. Alton Railroad Co., supra,* this Court declared unconstitutional a federal statute creating a compulsory multiemployer pension plan for railroad employees. The statute operated retroactively to provide pension benefits for employees who had left the railroad industry prior to the statute's enactment. 295 U.S. at 348. This Court unanimously held that the retroactive alteration of contractual rights to provide additional compensation for services already fully compensated constituted a denial of due process of law. 295 U.S. at 350. The MPPAA cannot be distinguished from the statute at issue in *Alton,*

and this court's holding in *Alton* compels the conclusion that the MPPAA impairs the contractual rights of withdrawing employers and, thus, violates the due process clause of the fifth amendment. The Second Circuit, in upholding the MPPAA's constitutionality, failed to give proper weight to this Court's decision in *Railroad Retirement Board v. Alton Railroad Co., supra.*

In *Allied Structural Steel Co. v. Spannaus,* 438 U.S. 234 (1978), this Court struck down a state statute which retroactively imposed minimum funding and vesting standards on particular pension plans and held the employer accountable for any funding deficiencies if the plan terminated. Although the statute at issue in *Spannaus* was examined under the contracts clause which applies only to state legislation, the due process clause imposes similar restraints on federal legislation. *See Spannaus,* 438 U.S. at 241. *See also, Spannaus,* 438 U.S. at 262 (Brennan, J. dissenting); *Northwestern National Life Insurance Co. v. Tahoe Regional Planning Agency,* 632 F.2d 104 (9th Cir. 1980). The MPPAA, like the state statute in *Spannaus,* grossly distorts Sibley's contractual obligations to its former employees by superimposing "sudden, totally unanticipated, and substantial retroactive obligation[s]" upon Sibley's "substantially beyond the terms of its employment contracts." 438 U.S. at 249-50. This forced payment of additional compensation for services already fully compensated substantially impairs Sibley's vested contract rights and, thus, violates the due process clause of the fifth amendment.

The retroactive abrogation of Sibley's contractual rights under its bakery closing and collective bargaining agreements is significantly more harsh and unfair than the impairment of contractual rights in *Spannaus.* The employer in *Spannaus* exercised virtually unrestricted control over its pension fund. The employer was the sole contributor to the fund and "retained a virtually unrestricted right to amend the plan in whole or in part, but was also free to terminate the plan and distribute the trust assets at any time and for any reason." 438

U.S. at 237. The state legislation imposed fiscal responsibility for the funding of employee pensions upon an employer who possessed nearly complete control over the establishment and funding of pension benefits. Nevertheless, this Court concluded that the employer was entitled to rely on its contract with its employees and declared the state statute to be unconstitutional. 438 U.S. at 250-51.

Sibley's and other employers who contribute or have contributed to multiemployer pension plans possess no control over the management of fund assets, the establishment of pension benefit levels, or the funding of pension benefits. Moreover, Sibley's negotiated an agreement which all parties believed set forth Sibley's entire obligations to the Fund, the Union and its bakery employees under its collective bargaining agreement upon the bakery closing. In such circumstances, imposing fiscal responsibility for the Fund's poor financial condition upon Sibley's is harsh and patently unfair. The MPPAA, in effect, makes all employers who contribute to multiemployer plans responsible for a debt which they cannot limit or control. Thus, the MPPAA is harsh and oppressive and violates the due process rights of all employers who contribute to multiemployer pension plans.

CONCLUSION

This Court should exercise its certiorari jurisdiction to resolve the conflict among the courts of appeals regarding the MPPAA's constitutionality, to determine whether the MPPAA as applied retroactively to Sibley's is constitutional, and to conform the Second Circuit's decision with controlling precedent of this Court.

Respectfully submitted,

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APPENDIX A

OPINIONS BELOW

In the

United States Court of Appeals

For the Second Circuit

No. 35 — August Term, 1983
(Argued October 3, 1983 Decided January 9, 1984)
Docket No. 83-7004

TEXTILE WORKERS PENSION FUND,

Plaintiff-Appellee,

vs.

STANDARD DYE & FINISHING CO., INC., ROCCO BARONE, BILL CARAFELLO, ADOLPH NAZARRO, SR., ADOLPH NAZARRO, JR., JOSEPH NAZARRO, DICK KNIGHT, DAVID LAVORGNA and MORRIS WAX,

Defendents,

STANDARD DYE & FINISHING CO., INC.,

Ddefendent-Appellant.

Nos. 70, 428 — August Term, 1983
(Argued October 3, 1983 Decided January 9, 1984)
Docket Nos. 83-7328, 83-7650

SIBLEY, LINDSAY & CURR CO., A DIVISION OF ASSOCIATED DRY GOODS CORP.,

Plaintiff-Appellee,

vs.

BAKERY, CONFECTIONERY & TOBACCO WORKERS INTERNATIONAL UNION OF AMERICA, AFL-CIO

AND

BAKERY & CONFECTIONERY UNION & INDUSTRY INTERNATIONAL PENSION FUND,

Defendants-Appellants.

Before:

CARDAMONE, PIERCE and PRATT
Circuit Judges

Appeals from decisions of the United States District Court for the Southern District of New York (Sprizzo, J.) (Docket No. 83-7004) and the United States District Court for the Western District of New York (Telesca, J.) (Docket No. 83-7328 & 83-7650) ruling on the constitutionality of the Multiemployer Pension Plan Amendments Act of 1980. The Decision in No. 83-7004 is affirmed.

Decision in Nos. 83-7328 and 83-7650 is reversed, except as to legal fees.

(List of counsel omitted)

CARDAMONE, Circuit Judge:

On these two appeals we are called upon to analyze the withdrawal liability provisions in the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA or Act), Pub. L. No. 96-364, 94 Stat. 1208 (codified in scattered sections of 29 U.S.C.) Although the two employers before us withdrew from the multiemployer plans, of which they had been members prior to the enactment of the MPPAA, the Act provides for withdrawal liability to be retroactively imposed. Thus, the common question in both appeals is whether the imposition of financial liability violates these employers' constitutional rights. This question has been the subject of extensive litigation, spawning scores of district court decisions and, as of this writing, dividing two of our sister circuits. *Compare Republic Indus. v. Teamsters Joint Council,* 718 F.2d 628 (4th Cir. 1983) (Act upheld) *with Shelter Framing Corp. v. PBGC,* 705 F.2d 1502 (9th Cir.) (Act struck down), *cert.*

granted, 52 U.S.L.W. 3304 (U.S. Oct. 18, 1983). We hold that the retroactive application of the MPPAA withdrawal provisions is constitutional in all respects.

Although this field of law has been plowed a number of times, we work it once again in the hope that our analysis, like Ariadne's slender filament of thread, will lead us surely through its labyrinths, making its complexities more easily understood. We turn first to the facts.

I. Facts

A - Standard

Standard Dye & Finishing Co., Inc. (Standard) was engaged for many years in the processing and distribution of dye and textiles. As an employer it contributed to a pension fund (Fund) on behalf of its employees beginning in 1961 when it signed a collective bargaining agreement with the Textile Union Workers of America (Union). The Fund is a self-insured multiemployer pension trust within the meaning of the Employee Retirement Income Security Act, 29 U.S.C. § 1001 *et. seq.* (ERISA) as amended by the MPPAA, and is jointly administered by an equal number of employer and union trustees pursuant to 29 U.S.C. § 186(c)(5)(B)(1976).

In 1980 Standard decided to liquidate its business because it was unable to pass on increasing costs to its customers. It advised the Union of this decision in May 1980 and its board of directors and stockholders formally voted in favor of liquidation in June. The liquidation plan called for the sale of Standard's assets for $1 million. Standard was paid all but $256,500 of this sum from the sale proceeds and $522,611.62 was distributed to Standard's stockholders. All these events occurred before the enactment of MPPAA on September 26, 1980. After its enactment, Standard paid an additional liquidating dividend of $210,470.42 to its stockholders.

Employment of all production workers terminated June 20, 1980, save for a handful retained to perform tasks incident to closing down operations. The last of those employees were terminated on October 31, 1980. Standard continued to make pension fund contributions on behalf of this smaller group until their termination.

In March 1981 Standard notified the Fund that it planned to liquidate and distribute the balance of its remaining assets of approximately $267,000. In June the Fund calculated Standard's withdrawal liability to be $817,398, payable in 69 equal quarterly installments of $18,544 with a final payment of $12,053. Standard did not contest the actuary's calculation of the debt. When the Fund did not receive the first payment due in August, it advised the company that unless it received the initial installment by October 1981 it would exercise its right under MPPAA to accelerate the debt and declare the full amount of the liability due and payable. When Standard still failed to make the required payment, the Fund commenced this action in the United States District Court for the Southern District of New York against Standard and eight of its stockholders who received liquidating dividends. The defendants moved for summary judgment, contending that the retroactive application of the withdrawal liability provision of the MPPAA unconstitutionally violated their rights to due process. On October 21, 1982 Judge Sprizzo denied that motion and upheld the constitutionality of the statute, ruling that the retroactive provision constituted a "rational means to a legitimate end." *Textile Workers Pension Fund v. Standard Dye & Finishing Co.*, 549 F. Supp. 404, 410 (S.D.N.Y. 1982). Defendants filed a petition seeking permission to file an interlocutory appeal which the district court granted and we granted defendants leave to appeal under 28 U.S.C. § 1292(b).

B – Sibley

Sibley, Lindsay & Curr Co. (Sibley), a division of the Associated Dry Goods Corporation, operates department stores in Rochester and elsewhere in the western part of New York State. For many years prior to 1980 Sibley operated a bakery at its Main Street store in Rochester. In 1955 the Bakery, Confectionery and Tobacco Workers International Union (Bakery Union) and various employers agree to establish a pension fund. One year later Sibley negotiated and entered into a formal collective bargaining agreement with the Bakery Union, which required it to make contributions to the pension fund.

The 1980 actuarial valuation report for the pension fund indicated that it was seriously overextended, listing assets of over $609 million and liabilities of over $1.4 billion resulting in an unfunded past service liability of $871 million. The total liability showed an increase of over $108 million from 1979.

On May 31, 1980 Sibley closed the bakery in its Main Street Rochester store and terminated the employment of 43 bakery workers. Earlier that month Sibley and the Bakery Union had executed an agreement with respect to the closing. Under its terms Sibley provided vacation and severance benefits to its terminated employees. The pension fund was not a party to the agreement, and the agreement did not purport to fix Sibley's withdrawal liability under ERISA.

In May 1981 the pension fund notified Sibley that its withdrawal liability amounted to $315,927 and Sibley began making monthly payments of $6,245 in July. The payments were made under protest to avoid the default provisions of the MPPAA. Sibley then filed this action in the United States District Court for the Western District of New York in June 1982 challenging the constitutionality of the retroactive imposition of withdrawal liability under the MPPAA. In August 1982, Judge Telesca denied the pension fund's and Union's motions to dismiss. Subse-

quently, Sibley's initial motion for a preliminary injunction and for a declaratory judgment was converted into a motion for summary judgment. On March 15, 1983 Judge Telesca granted Sibley's motion for summary judgment and ruled that the retroactive application of the MPPAA withdrawal liability provisions violated Sibley's right to due process of law. *See Sibley, Lindsay & Curr Co. v. Bakery, Confectionary and Tobacco Workers Int'l Union, et al.*, 566 F. Supp 32 (W.D.N.Y 1983). From this judgment, the Union and pension fund appeal.

II. Background and Legislative History

In order to understand the problem that Congress sought to remedy by imposing retroactive liability on employers withdrawing from multiemployer pension plans, it is necessary to review the reasons for the existence of these plans and the legislative history of the Act.

Multiemployer plans were originally developed in industries where job changes were frequent and there was little continuity in the employer-employee relationship. For example, in some industries employees are often hired for a specific project, and their employment terminates with the project's completion. In other industries conditions of fierce competition, frequent business failures or recurring layoffs prevent the establishment of a stable employer-employee relationship. In these kinds of industries workers cannot obtain meaningful pension rights from a single employer. Thus, collectively bargained for multi-employer pooled funds or plans came into being to provide pension protection for workers in highly volatile industries. *See* P. Berger and S. Hester, *Special Problems of Multiemployer Plans 1*, in *Pension and Profit Sharing Plans* (D. Rothman, ed. 1978).

Enacted in 1974, ERISA represented a comprehensive attempt by Congress to regulate the funding, management, operation, benefit provisions, and insurance of private employer pension

plans. One of Congress' central purposes in enacting ERISA was to prevent the great personal tragedy suffered by employees whose vested pension benefits were lost when plans were terminated. *Nachman Corp. v. PBGC*, 446 U.S. 359, 374 (1980). ERISA, therefore, set forth standards for pension plans regarding reporting and disclosure of information, participating and vesting rights, adequate funding, fiduciary responsibilities for trustees and enforcement procedures. In addition, ERISA created the Pension Benefit Guaranty Corporation (Guaranty Corporation) to provide insurance coverage for pension plan benefits in the event that a plan was terminated. In short, ERISA represented an attempt to protect and secure the pension rights and expectations of millions of employees and their dependents. *See* 29 U.S.C. § 1001 (1976).

Under ERISA, the Guaranty Corporation immediately insured the receipt of all "nonforfeitable benefits" that had been earned by employees in single employer plans. Multiemployer plan benefits were treated differently. They were not insured absolutely upon ERISA's enactment, but were guaranteed at the discretion of the Guaranty Corporation until January 1, 1978, when full guarantee was to become mandatory. *Id.* § 1381(c)(1). During the interim period, the Guaranty Corporation had discretion whether it would pay a terminating plan's participants the difference between the value of their guaranteed benefits and the value of the plan's assets on the date of termination. *Id.* § 1381(c)(2) (1974). If an employer wanted to withdraw it could do so without incurring liability, unless the plan terminated within five years of the employer's withdrawal without assets sufficient to provide employee benefits at the level guaranteed by the Guaranty Corporation. If a plan terminated, each employer who had contributed to the plan during the five year period preceding its termination incurred liability to the Guaranty Corporation for its proportionate share of the total expended, up to 30 percent of each employer's net worth. *Id.* §§ 1362, 1364.

As the January 1, 1978 date for mandatory guaranteed coverage drew closer, Congress became concerned about certain problems attendant to the changeover, particularly the potential costs of extending mandatory coverage to multiemployer plans. To have more time to consider the problem, it postponed the guarantee's effective date. *See* Pub. L. No. 95-214, 91 Stat. 1501 (1977). Pursuant to Pub. L. No. 95-214, the Guaranty Corporation prepared a comprehensive report analyzing the problems surrounding multiemployer pension plans. It noted that employer withdrawals posed a serious threat to the overall stability of such plans by burdening those employers that remained. As explained to the Ways and Means Committee:

> A key problem of ongoing multiemployer plans, especially in declining industries, is the problem of employer withdrawal. Employer withdrawals reduce a plan's contribution base. This pushes the contribution rate for remaining employers to higher and higher levels in order to fund past service liabilities, including liabilities generated by employers no longer participating in the plan, so-called inherited liabilities. The rising costs may encourage — or force — further withdrawals, thereby increasing the inherited liabilities to be funded by an ever-decreasing contribution base. This vicious downward spiral may continued until it is no longer reasonable or possible for the pension plan to continue.

Pension Plan Termination Insurance Issues: Hearing Before the Subcommittee on Oversight of the Committee on Ways and Means House of Representatives, 95th Cong., 2d Sess. 22 (1978) (Termination Hearings).

After considering these recommendations, Congress introduced legislation in the Spring of 1979 which ultimately became the MPPAA. To provide additional time to consider this legislation, the effective date for mandatory multiemployer plan termination insurance was delayed. *See* Pub. L. No. 96-24, 93 Stat. 70 (1979) and Pub. L. No. 96-239, 94 Stat. 341 (1980). The question of employer withdrawals from multiemployer plans was continually cited as a major problem. In reporting favorably upon the

bill, the House Education and Labor Committee addressed other problems as they affected financially troubled plans:

> In the case of a financially troubled plan, termination liability creates an additional incentive for employers to withdraw early. In such a plan, contribution increases may be escalating so sharply that termination liability may prove cheaper than continuing the plan. The remaining employers have an incentive to terminate the plan. Where active employees determine that benefits may be provided for them at considerably less cost than current contributions and are satisfied that vested benefits for retirees and others are virtually 100 percent covered by the guarantees, there is an incentive for the union to agree to terminate the plan. The result is to transfer the cost of providing benefits to the insurance system. The current termination insurance provisions of ERISA thus threaten the survival of multiemployer plans by exacerbating the problems of financially weak plans and encouraging employer withdrawals from and termination of plans in financial distress.
>
> The problem is essentially one of maturing plans in declining industries and a law that has proven inadequate in some respects and disfunctional in others. The committee fears that absent the change made in H.R. 3904, termination of multiemployer plans will become an increasing economic reality in the next decade.

H.R. Rep. No. 869, 96th Cong, 2d Sess. 54-55, *reprinted in* 1980 U.S. Code Cong. & Ad. News 2918, 2922-23.

ERISA's withdrawal liability provisions thus created an incentive for an employer to withdraw from a financially troubled multiemployer plan. Since withdrawing employers incurred only a contingent liability, an employer could withdraw from a plan and gamble that the plan would survive for five more years. If it did, the employer would avoid withdrawal liability. Congress sought to eliminate this loophole by requiring a withdrawing employer to continue funding its proportionate share of the plan's unfunded benefit obligations in order to "relieve the funding burden on remaining employers and to eliminate the incentive to pull out of a plan which would result if liability were imposed

only on a mass withdrawal by all employers." *Id.* at 67, *reprinted in* 1980 U.S. Code Cong. & Ad. News at 2935.

When the bill was first introduced on May 3, 1979 these rules providing for mandatory withdrawal liability were made effective as of February 27, 1979, the date on which the Guaranty Corporation had originally submitted its legislative proposals to Congress calling for these provisions. *Id.* at 100, *reprinted in* 1980 U.S. Code Cong. & Ad. News at 2968. Such retrospective effective date remained a part of the bill for over a year until June 1980, when the Senate Finance Committee found it to be unnecessarily harsh and shortened the retrospective period by advancing the effective date from February 1979 to April 29, 1980. As Senator Matsunaga stated in the debate on the MPPAA:

> The [retroactive] date was used to prevent any employer from withdrawing from a plan under the lenient rules in current law. To permit the withdrawal of these opportunistic employers without imposition of liability, would shift the entire burden on employers remaining as plan participants. The withdrawing employers whose workers had added to the plan's liability, would avoid their responsibility . . . *[T]hese employers would be able to walk away . . . and leave the other employers holding the bag* . . . (emphasis added)

126 Cong. Rec. 20,234 (1980) (statement of Sen. Matsunaga). *See id.* at 20,177 (statement of Senator Javits).

On May 22, 1980, the House unanimously approved the Act. *Id.* at 12,233-34. Senate approval for its version followed on July 29, 1980 by a vote of 85-1, *id.* at 20,247. After differences between the two Houses were resolved in September 1980, President Carter signed the MPPAA into law on September 26, 1980.

III. Due Process Analysis — Nachman Factors

It is familiar law that legislative acts adjusting the burdens and benefits of economic life carry with them a presumption of con-

stitutionality and that the person complaining of a due process violation must establish that the legislature has acted in an arbitrary and irrational manner. *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15-16 (1976); *Williamson v. Lee Optical Co.*, 348 U.S. 483, 487-88 (1955). The same rule prevails even though the effect of the legislation is to impose a new duty or liability based upon past acts. Thus, in *Turner Elkhorn*, the Supreme Court upheld the constitutionality of a federal law imposing liability on coal industry employers to compensate employees suffering from black lung disease despite the fact that they had terminated their employment *before* the act was passed. While the Supreme Court acknowledged that the justifications for prospective legislation may not suffice for retrospective legislation, it nevertheless rejected the employers' due process challenge, holding that the statute represented "a rational measure to spread the costs of the employees' disabilities to those who have profited from the fruits of their labor." 428 U.S. at 18.

In examining the constitutionality of the withdrawal liability provisions of the MPPAA, both of the courts below employed the analysis first set forth by the Seventh Circuit in *Nachman Corp. v. PBGC*, 592 F.2d 947, 960-63 (7th Cir. 1979), *aff'd on other grounds*, 446 U.S. 359 (1980). In *Nachman*, the Seventh Circuit upheld the employer liability provision of ERISA's single employer plan termination scheme against a due process challenge. After pointing out that rationality is determined by comparing the problem to the nature and scope of the burden imposed to remedy it, the court considered four separate factors. The *Nachman* court emphasized that these factors were only to be used to decide whether the legislation represented a rational means to a legitimate end, but were *not* to be used to express judicial approval or disapproval of the balance struck by Congress. *See* 592 F.2d at 960. The factors were: (1) the reliance interests of the parties affected; (2) whether the impairment of the private interest is effected in an area previously subjected to regulatory control; (3) the equities of imposing the legislative burdens; and

(4) the inclusion of statutory provisions designed to limit and moderate the impact of the burdens. *Id.*

After applying the *Nachman* factors the courts below reached opposite conclusions. The Fourth and the Ninth Circuits also applied the *Nachman* analysis with different results. Without deciding whether the traditional due process analysis or the *Nachman* approach should apply, we conclude that, in any event, the retrospective withdrawal liability provisions of the MPPAA are constitutional under the heightened *Nachman* four-factor test.

First Factor

In reaching this conclusion, we believe that the reliance interest of the Fund's participants in the ultimate realization of their vested benefits outweighs the employers' interests in withdrawing from the Funds prior to the MPPAA's enactment date. The employers argue that they relied on the existing state of the law at the time of their withdrawal and were "entitled to expect that ERISA would not be amended retroactively." This contention is not persuasive. While the MPPAA had not been passed at the time both of these employers ceased operations, its existence — together with its retrospective withdrawal liability provision — was a matter of public knowledge. The bill, originally introduced in May 1979, contained the retrospective mandatory withdrawal liability rules and, throughout the period predating passage of the Act, the concept of mandatory withdrawal liability had been the subject of intense congressional scrutiny. Nevertheless, the provisions of the MPPAA were left retrospective because of Congress' concern that many opportunistic employers would be encouraged to take advantage of the inherent delays in the legislative process and withdraw from plans prior to the enactment date. *See* 126 Cong. Rec. 9,236 (1980) (remarks of Sen. Bentsen); *id.* at 20,177 (remarks of Sen. Javits).

By April 29, 1980, the final effective date of the legislation, the

MPPAA was well along the road to enactment. Three congressional committees had already approved the bill with its original effective date of February 27, 1979. Such original date had remained a part of the bill until the Senate Finance Committee advanced the effective date to April 29, 1980. At the time Standard and Sibley withdrew from their plans there was strong evidence that the passage of the MPPAA was imminent and that the statute would be retrospective. Under these circumstances the employers were on constructive notice of their potential liability under the new statute. *See Republic, supra,* 718 F.2d at 638-39; *Peick v. PBGC,* 539 F. Supp. 1025, 1053 (N.D. Ill. 1982); 126 Cong. Rec. 20,234-36 (1980) (remarks of Sen. Matsunaga); *id.* at 20,177 (remarks of Sen. Javits). *But see Shelter Framing, supra,* 705 F.2d at 1511.

The Funds also assert an independent worker reliance interest. They claim that the employees bargained with their employers for pension contributions, and relied on them to continue making the agreed upon contributions to the plans so as not to prejudice employees' pension rights. In *Nachman,* the court found that the employees' reliance on receiving their vested benefits outweighed the employer's reliance on its ability to terminate its obligations without continuing liability. Concededly, *Nachman* involved a single employer plan, while the instant cases involve multiemployer plans where the participants do not have specific promises *from their own employers* to pay their pension benefits. It is nonetheless reasonable and fair to conclude that plan participants did expect their employers to continue making contributions necessary to support these expected benefits. The reason is plain. In negotiating collective bargaining agreements with the unions, both Standard and Sibley bargained for and received the services of their employees and, in return, agreed to contribute specified amounts into the pension funds on their employees' behalf. In agreeing to make these contributions, Standard and Sibley were, in effect, negotiating the issue of their employees' present wages at a level different than otherwise would obtain,

absent the employer's promise to make pension contributions. The fact that the pension payments ultimately would come from the Funds rather than directly from the employers cannot alter the fact that the employers obtained their bargained for benefits in exchange for their promises to make payments to the plans.

In *Shelter Framing*, the Ninth Circuit concluded that the employees' reliance interest went more toward the solvency of the plan as a whole rather than toward a single employer and that such interest did not translate into a justified reliance interest in any single employer's withdrawal liability. We disagree with the Ninth Circuit's conclusion because, regardless of whether the employee looks to the solvency of the whole plan instead of only its own employer, there still is a justifiable worker reliance interest. As just noted, in the multiemployer context the promise to pay benefits runs not from an employer, but from the trust. To the extent that any single employer withdraws from a plan, that employer is not directly breaching a duty to pay benefits to its employees. Nonetheless, the withdrawal of an employer from a multiemployer plan has the effect of placing the burden on the remaining employers to fund the plan. With that increased burden, other employers might also be tempted to withdraw, further weakening the contribution base and, eventually, jeopardizing the solvency of the entire plan. *See* Termination Hearings, *supra*. Viewed in this light, the threat of any single employer's withdrawal directly affects an individual employee's interest in having a viable and solvent pension fund, even though the fund is a multiemployer fund.[1] In sum, we believe that the reliance interest of the employers and therefore this first factor favors the retroactive application of the statute. *See Republic, supra*, 718 F.2d at 638; *Peick, supra*, 539 F. Supp. at 1052-53. *But see Shelter Framing, supra*, 705 F.2d at 1511-12.

Second Factor

The second factor in *Nachman* — whether impairment of the private interest is effected in an area previously subjected to regulatory control — weighs heavily against the employers in this case. In *Nachman,* the court wrote that since plan terminations had previously been subject to federal regulation, an employer's expectation that it would not have to fund its plan's vested benefits could be given less weight by Congress. 592 F.2d at 962. In that case the presence of IRS regulations with respect to plan termination mitigated Nachman's claim of surprise when ERISA was enacted with termination liability provisions. *Id.* at 962 n. 33

Just as the employer in *Nachman* was charged with constructive notice that its rights might some day be subject to congressional regulation, so too were Standard and Sibley. Notice was everywhere. At the time that these employers decided to close their operations, there had been decades of pre-MPPAA regulation of multiemployer plans under a variety of federal labor and tax laws. *See Peick, supra,* 539 F. Supp. at 1044. The enactment of ERISA in 1974 provided a comprehensive regulatory scheme mandating employer withdrawal liability in the single employer context. This, in itself, can be said to have "afforded clear warning that the federal government might one day act again and further buttress the legislative scheme it had created." *Peick, supra,* 539 F. Supp. at 1044-45 (footnote omitted). Standard and Sibley withdrew from their funds not only when pervasive regulation, including withdrawal liability under ERISA, existed in the pension field, but also when the advent of the MPPAA was imminent. Their withdrawal from plans — under fire as it were — makes their claim of reliance on the immutability of the law ring hollow. Because employers knew of a potential liability under ERISA for funding a share of vested employee benefits upon withdrawal, we do not share the view of the Ninth Circuit that the passage of the MPPAA — which fixed the already anticipated liability — effected a "drastic" change in the existing law. *See Shelter Framing, supra,* 705 F.2d at 1512.

Third Factor

The third *Nachman* factor involves weighing the equities of imposing the burden of withdrawal liability on Standard and Sibley. The employers argue that it is arbitrary and inequitable to burden them with liability for contributions beyond those they had agreed to pay. Sibley additionally maintains that it is not to blame for the unfunded vested liabilities incurred by the Fund and that fault should properly be placed on the Fund's trustees. The Funds, on the other hand, assert that a balancing of the same equities justifies the imposition of withdrawal liability on the employers rather than increasing the obligations of the remaining employers or jeopardizing the participants' vested pension benefits. In *Nachman*, the court found it reasonable for Congress to conclude that an employer, which had received its bargained for benefits, should bear the costs of a plan termination, rather than employees with vested benefit rights. 592 F.2d at 962. Adopting the view of *Turner Elkhorn, supra*, the *Nachman* court found the liability to be an actual, measurable cost of an employer's business. *Id. See Turner Elkhorn, supra*, 428 U.S. at 19.

When Congress was considering the MPPAA, it had to decide whether the withdrawing employer, remaining employers, or employee participants should bear the burden of any shortfalls in multiemployer plans. One of the flaws Congress had perceived in ERISA was its potential for encouraging early withdrawals. It was precisely this built-in weakness that Congress sought to remedy by making the Act retrospective. Certainly, it was not unreasonable for Congress to require the withdrawing employers to bear their burden of funding, rather than to leave the remaining employers "holding the bag." *See* 126 Cong. Rec. 20,234 (1980) (remarks of Sen. Matsunaga).

The employers' argument that the trustees should bear the burden for the underfunding is without merit. Although the trustees owe a fiduciary duty to the participant beneficiaries of the trusts, this obligation does not prevent them from also considering the

impact of their actions on employers. 29 U.S.C. § 186(c)(5)(B). Inasmuch as the employers select half of the trustees, some consideration by the trustees of the employers' interests was likely. *See Peick, supra,* 539 F. Supp at 1047-48.

From an examination of the Act itself, Congress plainly did not place the entire burden of underfunding on the withdrawing employers. Instead, the withdrawal liability feature was merely one part of a comprehensive revision of the law governing multiemployer plans. Under its compass, for example, Congress required employers to make higher minimum contributions than under ERISA, 29 U.S.C. § 1423 (Supp. V 1981); the Guaranty Corporation's insurance premiums were increased, *id.* § 1306; funds were made available to supplement plan assets so that insolvent plans could continue to operate with reduced benefit payments and without requiring prohibitively high employer contributions, *id.* § 1431; participants' benefits were made subject to limited reductions in financially troubled plans, *id.* § 1426, and the Guaranty Corporation's guarantee was reduced, *id.* § 1322a. *See Pieck, supra,* 539 F. Supp. at 1051-52. One can hardly conclude that Congress acted arbitrarily in balancing the equities among the various parties involved in multiemployer plans. On balance, the equities weigh in favor of the employees, and thus, this factor also supports the retroactive application of the Act. *See Republic, supra,* 718 F.2d at 638-39.

Fourth Factor

The final factor considered in *Nachman* was whether the statute included provisions to limit and moderate the impact of the burdens imposed. *See* 592 F.2d at 962-63. The employers maintain that the MPPAA lacks any moderating features similar to those in the single employer plan before the court in *Nachman* and conclude that this factor weighs against the retroactive application of the statute. The Funds assert that the Act contains numerous provisions designed to moderate the effect of the em-

ployer withdrawal liability provision. We agree with the latter contention.

We share the view of the *Republic* and *Peick* courts that Congress included a number of features designed to limit the impact and application of withdrawal liability. These provisions included limitations on what *conduct* of an employer constitutes a complete or partial withdrawal. *See, e.g.*, 29 U.S.C. § 1384 (Supp V 1981) (a cessation of covered operations as a result of a sale of an employer's assets will not, if certain conditions are met, result in a withdrawal); *id.* § 1398(1) (a withdrawal need not occur solely because of a change in corporate structure); *id.* § 1398(2) (withdrawal does not occur solely because of a suspension of contributions during a labor dispute). Congress also put certain limitations on the *amount* of an employer's liability where a withdrawal occurs. *See, e.g., id.* § 1389 (*de minimus* rule eliminating all withdrawal liability on assessments under $50,000); *id.* § 1405 (reducing liability upon the sale of assets); *id.* § 1399(c)(1)(B) (limiting an employer's liability "to the first 20 annual payments" in the event that more than twenty years are needed to amortize withdrawal assessment). Finally, Congress provided for *reductions* in the amount of employer's withdrawal liability based upon the occurrence of events subsequent to the withdrawal. *See, e.g., id.* § 1387 (liability may abate if employer resumes covered operations after a complete withdrawal); *id.* § 1388 (liability may abate if employer increases its contribution base units after a partial withdrawal); *id.* § 1384 (eliminating imposition of withdrawal liability where employer sells assets to an unrelated party, and that party continues to contribute at substantially the same level as the withdrawing employer). These provisions governing the kind of conduct, limitation on amount, and reductions based on subsequent events highlight the far-ranging efforts made by Congress to ameliorate the imposition of employer withdrawal liability. Accordingly, as in the analysis of the first three factors, the fourth *Nachman* factor must be viewed as supporting the retroactive application of this legislation.

Upon a consideration of all the *Nachman* factors, we conclude that the MPPAA provisions challenged here represent a rational means to a legitimate end and that the retroactive application of the withdrawal liability provisions does not violate the due process rights of either Standard or Sibley.

V. Sibley's Other Constitutional Challenges

A. Denial of the Due Process Rights to a Pre-Payment Hearing

Sibley has raised a number of other constitutional challenges to the MPPAA. It maintains that the Act impermissibly fails to provide it with a meaningful hearing prior to payment of its withdrawal liability. The fundamental requirement of due process, of course, is the opportunity to be heard at a meaningful time and in a meaningful manner. *Armstrong v Manzo,* 380 U.S. 545, 552 (1965). Unlike some legal rules, due process is not a technical concept with a "fixed content unrelated to time, place and circumstances." *Mathews v. Eldridge,* 424 U.S. 319, 334 (1976) (citing *Cafeteria & Restaurant Workers Union v. McElroy,* 367 U.S. 886, 895 (1961)). "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer,* 408 U.S. 471, 481 (1972). In *Mathews,* the Supreme Court held that a hearing was not required prior to the termination of Social Security disability benefits. In considering when a hearing was necessary, it focused on three factors: the private interest affected; the risk of an erroneous deprivation of such interest through the procedures used; and the public interest, including the functions and fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *See* 424 U.S. at 335.

Applying that analysis, the only private interest affected here is the employer's bank account. Since the statute requires an employer to make payments to the fund for its withdrawal liability, the MPPAA deprives it of the use of the funds paid. 29 U.S.C. § 1399(c) (Supp. V 1981). Nonetheless, such deprivation may be

only temporary for if it is later found that an employer did not owe the amount determined, or that it owed a lesser amount, the employer is entitled to a refund or an adjustment in the amount of its liability. *Id.* §§ 1103(c)(4), 1401(d). Again, while a full hearing prior to payment of withdrawal liability might reduce the possibility of an erroneous assessment, under the statute an employer is already permitted to furnish the plan with further information or point out inaccuracies in the Fund's determination of liability. *Id.* § 1399(b)(2). In such case, the Fund is required to undertake a "reasonable review" of such information, *id.* § 1399(b)(2)(B), and must notify the employer of its decision, the grounds for its decision, and the reason for any modification in the employer's withdrawal liability, *id.* These statutory provisions afford the Fund and the employer an opportunity to iron out their differences, possibly eliminating an erroneous deprivation of an employer's property. Upon a consideration of the public interests here involved, *see* discussion IV, *supra,* we have concluded that the legislative scheme employed by Congress for the collection of employer withdrawal liability was rational and did not violate Sibley's right to due process of law. *Mathews v. Eldridge, supra,* 424 U.S. at 349. *See Republic, supra,* 718 F.2d at 640-42. The additional analysis on the claimed denial of a prepayment hearing reinforces our earlier conclusion.

B. Denial of Access to the Courts and Trial by Jury

Sibley has also challenged the compulsory arbitration procedure of the MPPAA, maintaining that it violates Sibley's right of access to the courts and trial by jury. Specifically, Sibley attacks the rationality of having the trustees make the initial determination of withdrawal liability. Sibley challenges the presumption of correctness attaching to the Fund's determination, labeling the presumption as "arbitrary and irrational." Finally, Sibley argues that the withdrawal liability scheme of the MPPAA purports to create legal rights of a type normally enforced in an action for

damages and concludes that it should be afforded a jury trial. We have considered these claims and find them all to be without merit.

We begin by rejecting Sibley's contention that the trustees are inherently biased. *Ward v. Monroeville,* 409 U.S. 57 (1972), which it cites as support is distinguishable. In *Ward,* the Supreme Court held that a party was denied a fair trial when compelled to be tried before a mayor, responsible for village finances and whose court provided a substantial portion of the village funds. The Supreme Court found the local court biased in the course of performing its judicial function. Unlike that situation, the trustees here are required by law to serve the fund impartially, i.e. without regard to whether they were appointed by labor or by management, and to compute the employer's withdrawal according to certain detailed and explicit statutory guides. *See* 29 U.S.C. § 1391 (Supp. V 1981). Under these circumstances, we perceive no unfairness in Congress' decision to place the initial determination of withdrawal liability on the trustees and to provide that the Fund's determination is presumptively correct. *See Republic, supra,* 718 F.2d at 640-41. Further, since section 1401(b)(2) provides that either party may come to the district court to enforce, vacate or modify an arbitrator's award, Sibley is not denied meaningful access to the courts. *See Republic, supra,* 718 F.2d at 641-42.

Finally, we do not believe that the Act unconstitutionally deprives Sibley of a jury trial. It is well established that the Seventh Amendment applies only to "suits at common law." When Congress creates a new cause of action and remedies unknown to the common law, it may vest factfinding in a tribunal other than a jury, free from the strictures of the Seventh Amendment. *See Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n,* 430 U.S. 442, 458-61 (1977); *NLRB v. Jones & Laughlin Steel Corp.,* 301 U.S. 1, 48-49 (1937). Sibley's reliance on *Curtis v. Loether,* 415 U.S. 189 (1974) for support misses the mark. In *Curtis* the Supreme Court held the Seventh Amendment

applicable to private damage suits in federal courts brought under the housing discrimination provisions of the Civil Rights Act of 1968. There, Congress had simply provided for the enforcement of statutory rights in an ordinary civil action in the district courts, and the Supreme Court found no functional justification for denying the right to trial by jury for actions that involved rights and remedies typically enforced in an action at law. *See* 415 U.S. at 195. In contrast, under the MPPAA, Congress set up a detailed procedure involving the use of a specialized tribunal in which facts are not found by a jury. There is no constitutional infirmity in this legislative decision. *See Republic, supra,* 718 F.2d at 642.

C. Vagueness

Sibley next maintains that the statute is unconstitutionally vague. This challenge centers around the statutory method for calculating the amount of withdrawal liability. Sibley maintains that the language in 29 U.S.C. §1393 providing for the use of "reasonable" actuarial assumption and methods, and for allowing the use of actuarial estimates defies fair and consistent application, and that it is therefore unconstitutionally vague.

Challenges to federal statutes on the ground of vagueness rest on the principle that a person should be free to plan his or her behavior based upon laws which are clear enough to afford one a reasonable opportunity to know what is permitted and what is proscribed. *See Grayned v. City of Rockford,* 408 U.S. 104, 108 (1972). The degree of vagueness tolerated under the constitution varies, in part, according to the nature of the enactment. Statutes governing economic regulation are subject to a less stringent vagueness test than those governing constitutionally protected rights. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498-99 (1982). The only challenges here are to those provisions used to calculate the amount of withdrawal liability.

In reviewing vagueness challenges, courts have consistently upheld the use of phrases which on their face are not particularly descriptive. *See, e.g., United States v. National Dairy Prods. Corp.*, 372 U.S. 29 (1963) ("unreasonably low prices"); *Boyce Motor Lines v. United States*, 342 U.S. 337 (1952) ("so far as practicable, and, where feasible"); *Old Dearborn Distrib. Co. v. Seagram Distillers Corp.*, 299 U.S. 183 (1936) ("fair and open competition"); *Sproles v. Binford*, 286 U.S. 374 (1932) ("shortest practicable route"); *di Leo v. Greenfield*, 541 F.2d 949 (2d Cir. 1976) ("other due and sufficient cause"); *Brennan v. Occupational Safety & Health Review Comm'n.*, 505 F.2d 869 (10th Cir. 1974) ("near proximity"). Other courts that have already considered similar vagueness challenges to the MPPAA have uniformly rejected them. *See, e.g., Republic, supra*, 718 F.2d at 643; *Shelter Framing Corp. v. Carpenters Pension Trust*, 543 F. Supp. 1234, 1241 (C.D. Calif. 1982), *rev'd on other grounds*, 718 F.2d 628 (9th Cir. 1983); *Peick, supra*, 539 F. Supp. at 1059-61. We agree with the Fourth Circuit — where the employer raised similar challenges to the statute — that the phraseology employed is not so lacking in meaning as to be invalid. *See Republic, supra*, 718 F.2d at 643. Sibley's other vagueness claims are totally without merit and do not warrant discussion. In sum, the challenged provisions are not unconstitutionally vague.

D. Denial of Equal Protection

Sibley next asserts that the MPPAA is violative of Equal Protection by discriminating against it and other employers who were already contributing to multiemployer plans at the time of the MPPAA's enactment. Sibley maintains there is no rational basis for treating it differently from employers joining multiemployer plans after the date of enactment. Specifically, Sibley points to the "free look" provision under which a new employer can withdraw from a plan without liability. In effect, Sibley appears to argue that limiting the liability of the new entrants is irrational. All of these claims are unpersuasive.

In *Hodel v. Indiana*, 452 U.S. 314 (1981), the Supreme Court stated that a party raising an equal protection challenge to social and economic legislation not employing suspect classifications or impinging on fundamental rights bears a "heavy burden." *Id.* at 332. Economic legislation must be upheld when the legislative means are rationally related to a legitimate government purpose. *Id.* Such legislation carries with it a presumption of rationality that may only be overcome by a clear showing of arbitrariness and irrationality. *Id.* at 331-32. *See Vance v. Bradley*, 440 U.S. 93, 97 (1979).

The legislative history points out that the MPPAA was "designated to foster plan continuation and growth because [such] provide participants and beneficiaries [with the] greatest security against benefit loss." H. R. Rep. No. 869, 96th Cong., 2d Sess. 51, *reprinted in* 1980 U.S. Code Cong. & Ad. News at 2919. To foster the growth of plans, especially in the face of financial instability associated with employer withdrawals, Congress attempted to encourage new employers to join by providing various incentives, including the "free look" provision and the rule limiting any new employer's liability for unfunded vested benefits to those obligations created after the enactment of the MPPAA. As stated in the House Report:

> In order to avoid creating a severe disincentive to new employers entering a plan, the bill proposes a presumptive rule for allocating withdrawal liability that requires an employer entering a plan after the effective date of withdrawal liability who subsequently withdraws, to fund a share of the increase in the plan's unfunded benefit obligations during the period of the employer's contributions to the plan.

See H. R. Rep. No. 869, 96th Cong., 2d Sess. 67, *reprinted in* 1980 U.S. Code Cong. & Ad. News at 2935. After considering the pruposes for enactment of the challenged provisions, we cannot conclude that Congress' actions were arbitrary or irrational either in affording new employers a free look or in shielding them from liability for unfunded vested benefits that existed prior to a

putative employer's agreement to join the plan. Sibley's argument that it is no more responsible for the unfunded vested liability than the new entrants cannot carry the day. The unfunded vested liability referred to relates to the amounts incurred by those employers — including Sibley — who had already received their bargained for benefits (the services of their employees) in exchange for their promises to fund pension benefits. These employers cannot be equated with those that did not receive similar benefits. The question of funding was dealt with on a rational basis and we are unwilling to assess Congress' wisdom in choosing this instead of some other scheme. As the *Turner Elkhorn* court stated in another context:

> It is enough to say that the Act approaches the problem of cost-spreading rationally; whether a broader cost-spreading scheme would have been wiser or more practical under the circumstances is not a question of constitutional dimension.

428 U.S. at 19. In short, Sibley's equal protection challenge must fail.

E. Denial of Due Process by Impairment of Contract Rights

Finally, Sibley claims that the retroactive application of the MPPAA impaired its contractual rights with the Union and thereby violated its right to due process of law. Citing *Allied Structural Steel Co. v. Spannus*, 438 U.S. 234 (1978), Sibley argues that like the statute there struck down, the MPPAA grossly distorts its contractual obligations to its former employees by imposing obligations substantially beyond the terms of its employment contracts. It asserts that it had fixed its *entire* liability with the Union through the collective bargaining agreement and the May 4, 1980 termination agreement, to which the Fund was not a party. On the contrary, Sibley knew that the collective bargaining agreements it had executed required it to fund its employees' pension benefits, and that it had a contingent responsibility to con-

tinue to fund those benefits even in the event it withdrew from the multiemployer fund. As noted previously, the MPPAA was enacted in order to prevent employers from pulling out of multiemployer plans leaving others to shoulder the financial burdens of their withdrawal.

Reliance on *Allied* is not well taken since in that case the Supreme Court struck down as violative of the Contract Clause a Minnesota statute imposing pension fund liability on an employer. A number of critical differences exist between the Minnesota statute and the MPPAA. Most significantly, *Allied* involved a state statute, not an act of Congress. The prohibition against impairing the obligation of contracts is directed against state statutes. U.S. Const. Art. I, § 10 ("No State shall . . . pass any . . . law impairing the Obligation of Contracts . . . ."). In addition, the state legislature was there dealing with an entirely new area of regulation while Congress, in enacting the MPPAA, was not. The withdrawal liability sections of ERISA had been in effect since 1974. The MPPAA modified those existing provisions to effect mandatory — rather than contingent — withdrawal liability. The state statute in *Allied* imposed totally unexpected liability on employers, requiring them to fund vested pension rights for individuals, by shortening the contractual time required for vesting. *See Allied, supra,* 438 U.S. at 247, 250. The MPPAA, on the other hand, requires the withdrawing employer to pay its agreed upon share of the already vested, but not funded, liabilities. Since the MPPAA plainly bears a reasonable relation to a legitimate governmental purpose, Congress' enactment does not violate Sibley's constitutional right to due process of law.

VI. Legal Fees

The final matter to decide is whether the Bakery Union was properly made a party to this action. As in the court below, the Union argues that it was made a party to this suit without basis. It asserts there was no case or controversy against it and requests an

award of legal fees pursuant to 29 U.S.C. § 1451(e) (Supp. V 1981). Sibley, on the other hand, maintains that the Union was properly made a party to the action because the MPPAA gave it the right to enforce the withdrawal liability obligation. The district court agreed with Sibley and denied the Union's motion to dismiss.

Section 1451(a) provides, in part that:

> A plan fiduciary, employer, plan participant, or beneficiary, who is adversely affected by the act or omission of any party under this subtitle with respect to a multiemployer plan, *or an employee organization which represents such a plan participant or beneficiary for purposes of collective bargaining, may bring an action for appropriate legal or equitable relief, or both.*

Id. § 1451(a)(1) (emphasis added). Sibley instituted its action against both the Fund and the Union seeking to enjoin them from enforcing or collecting any of the amounts due for its withdrawal liability. It also sought a judgment declaring that the withdrawal liability provisions of the MPPAA were unconstitutional. Since the statute grants the Union a direct right of action to enforce the withdrawal liability caused by Sibley's withdrawal from the fund, a concrete dispute existed and the Bakery Union was properly made a party to this action. *See Supreme Court of Virginia v. Consumers Union of the United States, Inc.*, 446 U.S. 719 (1980); C. Wright, A. Miller & M. Kane, 10A *Federal Practice and Procedure* § 2757, at 585 (1983) (citing cases). There was no reason at the time the district court denied the motion to dismiss to assume that the Bakery Union, either under the cited language of the statute or by virtue of its common law duty to represent its member employees, would not seek to enforce Sibley's withdrawal liability. *See Person v. Association of the Bar of the City of New York*, 554 F.2d 534, 536 (2d Cir.), *cert. denied*, 434 U.S. 924 (1977). Thus, there existed a sufficient controversy for Judge Telesca to deny the Union's motion to dismiss the action. For these reasons, we reject the Union's claim that it was improperly joined and deny its application for fees.

VII. Conclusion

The judgment of the district court in *Standard* (Appeal Docket No. 83-7004) is affirmed and the judgment of the district court in *Sibley* (Appeal Docket Nos. 83-7328 and 83-7650) is reversed, except to the extent noted in VI above.

FOOTNOTE

[1] By Sibley's own account the fund was seriously overextended, and it stated that it did not want to make further contributions to the Fund because of "a substantial likelihood that at the conclusion of this action [it would] be unable to recover the sums paid to the Fund due to the Fund's financial condition."

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

SIBLEY, LINDSAY & CURR CO., A Division of ASSOCIATED DRY GOODS CORP.,

Plaintiff,

v.

BAKERY, CONFECTIONERY AND TOBACCO WORKERS INTERNATIONAL UNION OF AMERICA, AFL-CIO, and BAKERY AND CONFECTIONERY UNION AND INDUSTRY INTERNATIONAL and PENSION FUND,

Defendants.

MEMORANDUM DECISION and ORDER

A. BACKGROUND

This is an action challenging the constitutional validity of certain withdrawal liability provisions of the Multiemployer Pension Plan Amendment Act of 1980 (hereinafter the "MPPAA"), 29 U.S.C. § 1381 *et seq.* The MPPAA is an amendment to the Employee Retirement Income Security Act of 1974 (hereinafter "ERISA"), 29 U.S.C. § 1001 *et seq.* Presently before this Court are cross motions for summary judgment. Jurisdiction is conferred upon this Court by 24 U.S.C. § 1451. There being no genuine dispute between the parties as to the material facts presented in this case, judicial determination of the legal issues by means of summary judgment is appropriate.

B. FACTS

The relevant facts may be summarized as follows. Plaintiff, Sibley, Lindsay and Curr Co. (hereinafter "Sibley's") operates retail department stores in Rochester, New York. For many years prior to May 31, 1980, Sibley's operated a bakery at its Main Street, Rochester store. Defendant, Bakery and Confectionary Workers International Union of America (AFL-CIO) (hereinafter "Union") represented the bakery workers for purposes of collective bargaining. Since 1956 Sibley's has negotiated and entered into formal collective bargaining agreements with the Union. Pursuant to these labor agreements, Sibley's was contractually required to make certain monetary contributions to the Bakery and Confectionary Union and Industry International Pension Fund (hereinafter "Fund") on behalf of its bakery employees for the purpose of providing pension benefits to retired bakery employees.

On May 31, 1980 Sibley's closed its bakery and terminated the employment of forty-three bakery workers. According to Sibley's, the termination of its bakery operations was due to substantial financial losses attributable to the bakery. Prior to the closing of the bakery, Sibley's and the Union entered into a contractual agreement "governing their obligations . . . with regard to the closing of the [bakery] operation". (Complaint, Exhibit A). Under the terms of the agreement, Sibley's provided vacation and severance benefits for the terminated employees. Under Paragraph Five of the agreement, the parties expressly provided that the agreement constituted "the entire remaining obligations of both parties under their labor contract with regard to cessation of bakery production operations". *Id.*

At the time Sibley's terminated its bakery operation, ERISA imposed no financial liability upon Sibley's for cessation of its bakery business or its withdrawal from the Fund.[1] On September 26, 1980, four months *after* the closing of Sibley's bakery, the President signed into law the Multiemployer Pension Plan Act of

1980. (MPPAA) 19 U.S.C. § 1381 *et seq.* The MPPAA amended ERISA by, *inter alia,* creating and imposing substantial costs upon employers, such as Sibley's, who withdrew from multiemployer pension funds.[2] While the majority of the MPPAA became effective on September 26, 1980, the date President Carter signed the legislation, the withdrawal liability provisions of the Act were made effective as of April 29, 1980, approximately five months *prior* to the President's signature. Thus, Sibley's found itself subject to the withdrawal liability provisions of the MPPAA, notwithstanding the fact that it had closed its bakery and withdrew from the pension fund almost four months prior to the date the MPPAA was signed into law.

By letter dated May 11, 1982, the Fund notified Sibley's that it had computed Sibley's withdrawal liability under the MPPAA to be $315,927.00. An employer's withdrawal liability is its allocable share of the unvested benefits of the multiemployer fund as calculated by the Fund's trustees. 29 U.S.C. §§ 1381, 1391. The Fund provided Sibley's with the option of making payment in 59 consecutive installments, with interest. If an employer fails to make a monthly payment, the Plan Trustees are entitled to find the employer in default, and may declare the full amount of the employer's withdrawal liability to be due immediately. 29 U.S.C. § 1399(c)(5). Since July, 1981, Sibley's, under protest, and solely to avoid the default provisions of the MPPAA, has paid monthly installments of $6,245.00 to the Fund.

On June 25, 1982, Sibley's filed the instant action challenging the constitutionality of the MPPAA's retroactive imposition of withdrawal liability. By order of this Court dated August 4, 1982, Sibley's motion for a preliminary injunction was denied, the Fund's motion for dismissal was denied, the Union's motion for dismissal was denied, and venue was found to be proper in the Western District of New York. Additionally, it was determined that the plaintiff's motion for a preliminary injunction would be converted into a motion for summary judgment. On September

1, 1982, the Fund and the Union filed cross motions for summary judgment. The parties were given ample time to submit materials in support of their summary judgment motions and the issues raised in the complaint have been exhaustively researched and briefed by the parties.

C. The Constitutionality of the MPPAA's Imposition of Retroactive Withdrawal Liability Under the Due Process Clause.

It is well settled that legislative acts adjusting the burden and benefits of economic life carry with them a presumption of constitutionality. "[T]he burden is on the one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way". *Usery v. Turner Elkhorn Mining Co.*, 628 U.S. 1 (1976). The Court in *Turner Elkhorn* went on to state, however, that legislation imposing retroactive burdens may be subject to greater judicial scrutiny than legislation with simply prospective application. "It does not follow . . . that what Congress can legislate prospectively, it can legislate retrospectively. The retroactive aspects of legislation, as well as the prospective aspects, must meet the test of due process, and the justification for the latter may not suffice for the former." *Id.* at 16-17.

In *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 592 F.2d 947 (7th Cir. 1979) the Seventh Circuit articulated a four factor test in determining whether retroactive legislation violates the due process clause of the Fifth Amendment. The four factor analysis of *Nachman* has been utilized by other district courts in adjudicating the identical constitutional challenge to the MPPAA as is presented here.[4] I agree that the *Nachman* test is the proper approach and consequently adopt its use for consideration of the instant case.

Initially, it must be emphasized that judicial review of economic legislation under the Due Process Clause is limited to a determination as to whether the legislation represents a rational

means to a legitimate end. *See Turner Elkhorn Mining*, 428 U.S. at 18-19. Under *Nachman*, the rationality of a retroactive legislature enactment is determined by a "comparison of the problem to be remedied with the nature and scope of the burden imposed to remedy that problem". *Nathman, supra*, at 960. In making this comparison, the Seventh Circuit identified four factors to be used as guidelines in ascertaining the constitutionality of retroactive legislation. The four factors are:

(1) The reliance interest of the parties affected.

(2) Whether the private interest that is impaired is in an area previously subjected to regulatory control.

(3) The equities of imposing the legislative burden.

(4) The inclusion of statutory provisions designed to limit and moderate the impact of the burden.

1. *The Reliance Interests of the Parties* - Sibley's argues with great force that its reliance interest is substantial because it was entitled to rely on the existing state of the law when it closed the bakery and withdrew from the Fund. The Fund, on the other hand, argues at length that Sibley's should not have relied on existing law because they knew or should have known that Congress was going to enact legislation that would have a drastic retroactive effect on their withdrawal liability. "In view of the legislative history of the MPPAA and particularly the amount of congressional activity in the area prior to Sibley's withdrawal, the company should have been more knowledgeable about the prospects for mandatory withdrawal liability." *(Defendants Memorandum of Law*, pp. 21)

This Court declines to charge Sibley's with the responsibility of predicting congressional action. Forecasting congressional action (or lack of action) is akin to forecasting the weather or the stock market: There are simply too many unpredictable variables involved. To adopt the view urged by the defendants would be to impose a burden upon Sibley's to be a clairvoyant — to predict

that Congress would pass legislation four months hence. As Judge Hill stated in *Shelter Framing Corp. v. Carpenters Pension Trust*, 543 F. Supp. 1234 (D.C.Cal. 1982): "No one should be held reasonably to anticipate a given type of congressional action on any subject. Outside of the tax area, *there is no authority that imposes on anyone the burden of predicting congressional action.*" *Id.* at 1249 (emphasis added).

In measuring the reliance interest of a party, a court must also consider what that party would have done had it known that the legislative action was coming. *Welch v. Henry*, 305 U.S. 134, 146-147 (1938); *Adams Nursing Home v. Mathews*, 548 F.2d 1077, 1081 (1st Cir. 1977). Sibley's argues, and I agree, that the company had several options had it known that substantial withdrawal liability was going to be imposed. Sibley's could have chosen to continue operating the bakery, or sold the bakery's assets to a company which participated in the plan and intended to remain in business. Alternatively, Sibley's could have withdrawn partially from the Fund and reduced its withdrawal liability. 29 U.S.C. § 1386.

In contrast, the reliance interest of the other parties affected, the employees and the Fund, is slight, if not altogether speculative. Defendents argue that Sibley's bakery workers were relying on their employers continued participation in the multiemployer pension plan with the expectation that they will be paid pension benefits upon their retirement. However, it is the Fund that is responsible for maintaining pension benefit levels. As Judge Hill found in *Shelter Framing*: "The promises that were made to plaintiff's employees and upon which they may have relied were made . . . by the [Fund], and not by their particular employer." *Shelter Framing, supra*, at 1250.

Moreover, Sibley's withdrawal from the Fund did not terminate or render the fund insolvent. The evidence presented, in fact, indicates that the Fund is in sound financial condition, notwithstanding Sibley's withdrawal. The Fund has submitted the

affidavit of Dale B. Grant, a licensed actuary who prepares actuarial reports for the Fund, and who states that the Fund is in sound financial shape, having current assets of over 723 Million Dollars. (See Exhibit A of Defendants motion in opposition to the granting of a preliminary injunction). In sum, I conclude that Sibley's reliance interest outweighs the reliance interest of the other parties affected by the withdrawal liability.

2. *Previous Regulation of the Area.* There is no question that pension plan termination is an area subject to heavy federal regulation. *Nachman, supra,* at 962; *R.A. Gray Co. v. Oregon-Washington Carpenters Pension Trust Fund* Civil No. 81-912 RE (D.Ore. 1982). The *Nachman* decision indicates, however, that this factor is not so much concerned with the *existence* of previous regulation as it is with the *nature* and *scope* of that previous regulation. *Nachman, supra,* at 962. Thus, the "previous regulation" factor is closely related to the "reliance" factor just discussed; for the nature and scope of the previous regulation affects the expectations of the party upon whom the burden of retroactive legislation falls. "[F]or retroactive legislation to be valid, the new and more burdensome legislation must be closely akin in type and scope to the prior regulation." *Shelter Framing, supra,* at 1251.

In the instant case, the burdens imposed upon Sibley's under the MPPAA are not "closely akin" to the burdens imposed by ERISA. Withdrawal liability under the MPPAA is far more certain and far more substantial than the contingent liability provisions found in ERISA at the time Sibley's withdrew from the Fund. Again, I must agree with the reasoning of Judge Hill: "If [an employer] is in a regulated field, he can anticipate some clarification and modification, but cannot forsee change of a most drastic type, especially when applied to a transaction already completed before the new legislation is enacted." *Shelter Framing, supra,* at 1251-52.

3. *The Equities of Imposing the Burdens of Retroactive Legisla-*

tion. Under the *Nachman* analysis, a look at the equities of imposing the retroactive withdrawal liability is relevant in determining whether the statute is rational or irrational. *Nachman, supra,* at 962.

I find that retroactive application of the withdrawal liability provisions of the MPPAA imposed an inordinate and unduly harsh burden upon employers, such as Sibley's who withdrew from a multiemployer pension fund during the five month retroactive period. (April 19, 1980 — September 29, 1980). The law as it existed when Sibley's withdrew imposed only contingent liability upon withdrawing employers, strictly limited in terms of both time and circumstances. At the time Sibley's withdrew, it had previously negotiated an agreement with the Union purporting to set forth the entire remaining obligations owed to its employees as a result of the termination of its bakery operations. Employers who withdrew prior to the seemingly arbitrarily established April 19th retroactive date were subject to the far less burdensome contingent liability provisions of ERISA. Employers who remained in the Fund after the date the MPPAA was enacted had several options available to them that Sibley's, by reason of its untimely withdrawal, do not enjoy.[6] Accordingly, I agree with the conclusions reached by Judge Hill: "[P]laintiff, and those similarly situated, are being forced to bear a very disproportionate burden. They must bear the costs of a large problem which, so far as I can see, they had little if any role in creating." *Shelter Framing, supra,* at 1253.

4. *Statutory Provisions Limiting and Moderating the Burden.* Both Judge Hill in *Nachman, supra* and Judge Redden in *R.A. Gray Co.* concluded that the MPPAA contained no significant features to moderate the imposition of large withdrawal liability. I concur with their findings and hold that this factor weighs against the constitutionality of the statute as applied to Sibley's.

CONCLUSION

After careful consideration and application of the *Nachman* four factor test, I find that although it is an "extremely close call" (*see Pieck v. Pension Ben. Guaranty Corp.*, 539 F. Supp. 1025, 1056 (N.D.Ill. 1982)) retroactive application of the MPPAA violated Sibley's right to due process of the law as protected by the Fifth Amendment.[7] My holding is therefore limited: Under the facts and circumstances presented by this case and applied under the *Nachman* analysis, imposition of retroactive withdrawal liability upon Sibley's was not a rational means to achieve the legislative purpose. Accordingly, plaintiff's motion for summary judgment is granted and defendants' cross-motions for summary judgment are denied.

SO ORDERED.

MICHAEL A. TELESCA
United States District Judge

DATED: Rochester, New York,
March 15, 1983.

FOOTNOTES

[1] ERISA did impose a *contingent* obligation upon Sibley's to pay its proportionate share of the sums needed to cover vested benefits if the Fund were to terminate within five years of Sibley's withdrawal. If the Fund remained solvent for five years after Sibley's withdrawal, Sibley's would be relieved of all financial liability. 29 U.S.C. § 1365. Employers, such as Sibley's, could purchase insurance from the Pension Benefit Guaranty Corporation to protect themselves from the contingent liability if the Fund failed within five years. 29 U.S.C. § 1323.

[2] The primary purpose of imposing substantial withdrawal liability was to reduce a perceived incentive for employers to withdraw early from financially troubled pension funds with the hope that the Fund would remain solvent for at least five years, thus relieving the employer of any contingent liability. *See* Footnote 1, *supra*. For an exhaustive analysis of the legislative history of the MPPAA see *Pieck v. Pension Benefit Guaranty Corp.*, 539 F. Supp. 1025 (N.D. Ill. 1982).

[3] The *Nachman* case addressed the issue whether retroactive application of the *single employer* termination insurance provisions contained in ERISA violated the due process clause. While the Supreme Court did not expressly approve the *Nachman* four factor test in its review of the case, the Court in a footnote cited with apparent approval part of the analysis used by the lower court. (*See* 446 U.S. 359, 367, n. 12); *Shelter Framing, supra.*

[4] *See also Adams Nursing Home & Matthews*, 548 F.2d 1077 (1st Cir. 1977) where the First Circuit stated: "[L]aws that unsettle settled rights can be harsh, and they deserve special scrutiny." *Id.* at 1080.

[5] Application of the *Nachman* test has yielded varying results however. *Compare Shelter Framing v. Carpenters Pension Trust for Southern California,* 543 F. Supp. 1234 (C.D.C. 1982) (retroactive imposition of withdrawal liability violates due process clause) with *R.A. Gray and Co. v. Oregon-Washington Carpenters-Employers Pension Trust Fund,* Civil No. 81-912-RE (D.Ore. 1982) (no constitutional violation found in MPPAA's retroactive imposition of withdrawal liability). Both Sibley's and the Fund utilized the *Nachman* four-factor analysis in arguing their respective positions.

[6] See discussion of the "Reliance Interest" factor, *supra*.

[7] I therefore need not address Sibley's other constitutional arguments challenging the retroactive impact of the MPPAA.

APPENDIX B

CONSTITUTIONAL PROVISIONS

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U.S. Const. amend. V:

> No person shall be . . . deprived of life, liberty, or property, without due process of law . . .

U.S. Const. amend. VII:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . .

U.S. Const. art. I, section 9, cl.3:

> No Bill of Attainder or ex post facto law shall be passed.

U.S. Const. art. I, section 10, cl.1:

> No State shall pass any Bill of Attainder or ex post facto Law or Law impairing the Obligation of Contracts . . .

APPENDIX C

STATUTORY PROVISIONS

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STATUTORY PROVISIONS

9 U.S.C. §10:

In either of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration –

(a) Where the award was procured by corruption, fraud, or undue means.

(b) Where there was evident partiality or corruption in the arbitrators, or either of them.

(c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(e) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

9 U.S.C. §11:

In either of the following cases the United States court in and for the district wherein the award was made may make an order modifying or correcting the award upon the application of any party to the arbitration –

(a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.

(b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.

(c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties.

29 U.S.C. §1104(a)(1):

(a) Prudent man standard of care. (1) Subject to sections 403(c) and (d) [29 USCS § 1103(c) and (d)], 4042 [29 USCS § 1342], and 4044 [29 USCS § 1344], a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and –

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this title or title IV.

29 U.S.C. §1132 (g):

(g) Attorney's fees and costs; awards in actions involving delinquent contributions. (1) In any action under this title (other than an action described in paragraph 2) by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party.

(2) In any action under this title by a fiduciary for or on behalf of a plan to enforce section 515 [29 USCS § 1145] in which a judgment in favor of the plan is awarded, the court shall award the plan -

(A) the unpaid contributions,

(B) interest on the unpaid contributions,

(C) an amount equal to the greater of -

(i) interest on the unpaid contributions, or

(ii) liquidated damages provided for under the plan in an amount not in excess of 20 percent (or such higher percentage as may be permitted under Federal or State law) of the amount determined by the court under subparagraph (A),

(D) reasonable attorney's fees and costs of the action, to be paid by the defendant, and

(E) such other legal or equitable relief as the court deems appropriate.

For purposes of this paragraph, interest on unpaid contributions shall be determined by using the rate provided under the plan, or, if none, the rate prescribed under section 6621 of the Internal Revenue Code of 1954 [26 USCS § 6621].

29 U.S.C. §1145:

Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of

a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement.

29 U.S.C. §1362(b):

(b) Amount of liability. Any employer to which this section applies shall be liable to the corporation, in an amount equal to the lesser of -

(1) the excess of -

(A) the current value of the plan's benefits guaranteed under this title on the date of termination over

(B) the current value of the plan's assets allocable to such benefits on the date of termination, or

(2) 30 percent of the net worth of the employer determined as of a day, chosen by the corporation but not more than 120 days prior to the date of termination, computed without regard to any liability under this section.

29 U.S.C. §1364:

(a) This section applies to all employers who maintain a plan under which more than one employer makes contributions (other than a multiemployer plan) at the time such plan is terminated, or who, at any time within the 5 plan years preceding the date of termination, made contributions under the plan.

(b) The corporation shall determine the liability of each such employer in a manner consistent with section 4062 [29 USCS § 1362] except that the amount of the liability determined under section 4062(b)(1) [29 USCS § 1362(b)(1)] with respect to the entire plan shall be allocated to each employer by multiplying such amounts by a fraction -

(1) the numerator of which is the amount required to be con-

tributed to the plan by each employer for the last 5 plan years ending prior to the termination, and

(2) the denominator of which is the total amount required to be contributed to the plan by all such employers for such last 5 years,

and the limitation described in section 4062(b)(2) [29 USCS § 1362(b)(2)] ~~shall be~~ applied separately to each employer. The corporation may also determine the liability of each such employer on any other equitable basis prescribed by the corporation in regulations.

29 U.S.C. §1381:

(a) If an employer withdraws from a multiemployer plan in a complete withdrawal or a partial withdrawal, then the employer is liable to the plan in the amount determined under this part [29 USCS §§ 1381 et seq.] to be the withdrawal liability.

(b) For purposes of subsection (a) –

(1) The withdrawal liability of an employer to a plan is the amount determined under section 4211 [29 USCS § 1391] to be the allocable amount of unfunded vested benefits, adjusted –

(A) first, by any de minimis reduction applicable under section 4209 [29 USCS 1389],

(B) next, in the case of a partial withdrawal, in accordance with section 4206 [29 USCS § 1386],

(C) then, to the extent necessary to reflect the limitation on annual payments under section 4219(c)(1)(B) [29 USCS § 1399(c)(1)(B)], and

(D) finally, in accordance with section 4225 [29 USCS § 1405].

(2) The term "complete withdrawal" means a complete withdrawal described in section 4203 [29 USCS § 1383].

(3) The term "partial withdrawal" means a partial withdrawal described in section 4205 [29 USCS § 1385].

29 U.S.C. §1382:

When an employer withdraws from a multiemployer plan, the plan sponsor, in accordance with this part [29 USCS §§ 1381 et seq.], shall -

(1) determine the amount of the employer's withdrawal liability,

(2) notify the employer of the amount of the withdrawal liability, and

(3) collect the amount of the withdrawal liability from the employer.

29 U.S.C. §1383:

(a) Determinative factors. For purposes of this part [29 USCS §§ 1381 et seq.], a complete withdrawal from a multiemployer plan occurs when an employer -

(1) permanently ceases to have an obligation to contribute under the plan, or

(2) permanently ceases all covered operations under the plan.

29 U.S.C. §1390:

(a) An employer who withdraws from a plan in complete or partial withdrawal is not liable to the plan if the employer -

(1) first had an obligation to contribute to the plan after the date of the enactment of the Multiemployer Pension Plan Amendments Act of 1980 [enacted Sept. 26, 1980],

(2) had an obligation to contribute to the plan for no more than the lesser of -

(A) 6 consecutive plan years preceding the date on which the employer withdraws, or

(B) the number of years required for vesting under the plan,

(3) was required to make contributions to the plan for each such plan year in an amount equal to less than 2 percent of the sum of all employer contributions made to the plan for each such year, and

(4) has never avoided withdrawal liability because of the application of this section with respect to the plan.

(b) Subsection (a) shall apply to an employer with respect to a plan only if -

(1) the plan is not a plan which primarily covers employees in the building and construction industry;

(2) the plan is amended to provide that subsection (a) applies;

(3) the plan provides, or is amended to provide, that the reduction under section 411(a)(3)(E) of the Internal Revenue Code of 1954 [26 USCS § 411(a)(3)(E)] applies with respect to the employees of the employer; and

(4) the ratio of the assets of the plan for the plan year preceding the first plan year for which the employer was required to contribute to the plan to the benefit payments made during that plan year was at least 8 to 1.

29 U.S.C. §1391:

(a) Determination of amount of unfunded vested benefits allocable to employer withdrawn from plan. The amount of the unfunded vested benefits allocable to an employer that withdraws from a plan shall be determined in accordance with subsection (b), (c), or (d) of this section.

(b) Factors determining computation of amount of unfunded vested benefits allocable to employer withdrawn from plan. (1) Except as provided in subsections (c) and (d), the amount of unfunded vested benefits allocable to an employer that withdraws is the sum of -

(A) the employer's proportional share of the unamortized amount of the change in the plan's unfunded vested benefits for plan years ending after April 28, 1980, as determined under paragraph (2), [;]

(B) the employer's proportional share, if any, of the unamortized amount of the plan's unfunded vested benefits at the end of the plan year ending before April 29, 1980, as determined under paragraph (3); and

(C) the employer's proportional share of the unamortized amounts of the reallocated unfunded vested benefits (if any) as determined under paragraph (4).

If the sum of the amounts determined with respect to an employer under paragraphs (2), (3), and (4) is negative, the unfunded vested benefits allocable to the employer shall be zero.

(2)(A) An employer's proportional share of the unamortized amount of the change in the plan's unfunded vested benefits for plan years ending after April 28, 1980, is the sum of the employer's proportional shares of the unamortized amount of the change in unfunded vested benefits for each plan year in which the employer has an obligation to contribute under the plan ending -

(i) after such date, and

(ii) before the plan year in which the withdrawal of the employer occurs.

(B) The change in a plan's unfunded vested benefits for a plan year is the amount by which -

(i) the unfunded vested benefits at the end of the plan year; exceeds

(ii) the sum of –

(I) the unamortized amount of the unfunded vested benefits for the last plan year ending before April 29, 1980, and

(II) the sum of the unamortized amounts of the change in unfunded vested benefits for each plan year ending after April 28, 1980, and preceding the plan year for which the change is determined.

(C) The unamortized amount of the change in a plan's unfunded vested benefits with respect to a plan year is the change in unfunded vested benefits for the plan year, reduced by 5 percent of such change for each succeeding plan year.

(D) The unamortized amount of the unfunded vested benefits for the last plan year ending before April 29, 1980, is the amount of the unfunded vested benefits as of the end of that plan year reduced by 5 percent of such amount for each succeeding plan year.

(E) An employer's proportional share of the unamortized amount of a change in unfunded vested benefits is the product of –

(i) the unamortized amount of such change (as of the end of the plan year preceding the plan year in which the employer withdraws); multiplied by

(ii) a fraction –

(I) the numerator of which is the sum of the contributions required to be made under the plan by the employer for the year in which such change arose and for the 4 preceding plan years, and

(II) the denominator of which is the sum for the plan

year in which such change arose and the 4 preceding plan years of all contributions made by employers who had an obligation to contribute under the plan for the plan year in which such change arose reduced by the contributions made in such years by employers who had withdrawn from the plan in the year in which the change arose.

(3) An employer's proportional share of the unamortized amount of the plan's unfunded vested benefits for the last plan year ending before April 29, 1980, is the product of -

(A) such unamortized amount; multiplied by -

(B) a fraction -

(i) the numerator of which is the sum of all contributions required to be made by the employer under the plan for the most recent 5 plan years ending before April 29, 1980, and

(ii) the denominator of which is the sum of all contributions made for the most recent 5 plan years ending before April 29, 1980, by all employers -

(I) who had an obligation to contribute under the plan for the first plan year ending on or after such date, and

(II) who had not withdrawn from the plan before such date.

(4)(A) An employer's proportional share of the unamortized amount of the reallocated unfunded vested benefits is the sum of the employer's proportional shares of the unamortized amount of the reallocated unfunded vested benefits for each plan year ending before the plan year in which the employer withdrew from the plan.

(B) Except as otherwise provided in regulations prescribed by the corporation, the reallocated unfunded vested benefits for a plan year is the sum of -

(i) any amount which the plan sponsor determines in that

plan year to be uncollectible for reasons arising out of cases or proceedings under title 11, United States Code [11 USCS §§ 101 et seq.], or similar proceedings.[,]

(ii) any amount which the plan sponsor determines in that plan year will not be assessed as a result of the operation of section 4209, 4219(c)(1)(B), or section 4225 [29 USCS §§ 1389, 1399(c)(1)(B), or 1405] against an employer to whom a notice described in section 4219 [29 USCS § 1399] has been sent, and

(iii) any amount which the plan sponsor determines to be uncollectible or unassessable in that plan year for other reasons under standards not inconsistent with regulations prescribed by the corporation.

(C) The unamortized amount of the reallocated unfunded vested benefits with respect to a plan year is the reallocated unfunded vested benefits for the plan year, reduced by 5 percent of such reallocated unfunded vested benefits for each succeeding plan year.

(D) An employer's proportional share of the unamortized amount of the reallocated unfunded vested benefits with respect to a plan year is the product of –

(i) the unamortized amount of the reallocated unfunded vested benefits (as of the end of the plan year preceding the plan year in which the employer withdraws); multiplied by

(ii) the fraction defined in paragraph (2)(3)(ii).

(c) Amendment of multiemployer plan for determination respecting amount of unfunded vested benefits allocable to employer withdrawn from plan; factors determining computation of amount. (1) A multiemployer plan, other than a plan which primarily covers employees in the building and construction industry, may be amended to provide that the amount of unfunded vested benefits allocable to an employer that withdraws

from the plan is an amount determined under paragraph (2), (3), (4), or (5) of this subsection, rather than under subsection (b) or (d). A plan described in section 4203(b)(1)(B)(i) [29 USCS § 1383(b)(1)(B)(i)] (relating to the building and construction industry) may be amended, to the extent provided in regulations prescribed by the corporation, to provide that the amount of the unfunded vested benefits allocable to an employer not described in section 4203(b)(1)(A) [29 USCS § 1383(b)(1)(A)] shall be determined in a manner different from that provided in subsection (b).

(2)(A) The amount of the unfunded vested benefits allocable to any employer under this paragraph is the sum of the amounts determined under subparagraphs (B) and (C).

(B) The amount determined under this subparagraph is the product of -

(i) the plan's unfunded vested benefits as of the end of the last plan year ending before April 29, 1980, reduced as if those obligations were being fully amortized in level annual installments over 15 years beginning with the first plan year ending on or after such date; multiplied by

(ii) a fraction -

(I) the numerator of which is the sum of all contributions required to be made by the employer under the plan for the last 5 plan years ending before April 29, 1980, and

(II) the denominator of which is the sum of all contributions made for the last 5 plan years ending before April 29, 1980, by all employers who had an obligation to contribute under the plan for the first plan year ending after April 28, 1980, and who had not withdrawn from the plan before such date.

(C) The amount determined under this subparagraph is the product of -

(i) an amount equal to -

(I) the plan's unfunded vested benefits as of the end of the plan year preceding the plan year in which the employer withdraws, less

(II) the sum of the value as of such date of all outstanding claims for withdrawal liability which can reasonably be expected to be collected, with respect to employers withdrawing before such plan year, and that portion of the amount determined under subparagraph (B)(i) which is allocable to employers who have an obligation to contribute under the plan in the plan year preceding the plan year in which the employer withdraws and who also had an obligation to contribute under the plan for the first plan year ending after April 28, 1980; multiplied by

(ii) a fraction -

(I) the numerator of which is the total amount required to be contributed under the plan by the employer for the last 5 plan years ending before the date on which the employer withdraws, and

(II) the denominator of which is the total amount contributed under the plan by all employers for the last 5 plan years ending before the date on which the employer withdraws, increased by the amount of any employer contributions owed with respect to earlier periods which were collected in those plan years, and decreased by any amount contributed by an employer who withdrew from the plan under this part [29 USCS §§ 1381 et seq.] during those plan years.

(D) The corporation may by regulation permit adjustments in any denominator under this section, consistent with the pur-

poses of this title, where such adjustment would be appropriate to ease administrative burdens of plan sponsors in calculating such denominators.

(3) The amount of the unfunded vested benefits allocable to an employer under this paragraph is the product of –

(A) the plan's unfunded vested benefits as of the end of the plan year preceding the plan year in which the employer withdraws, less the value as of the end of such year of all outstanding claims for withdrawal liability which can reasonably be expected to be collected from employers withdrawing before such year; multiplied by

(B) a fraction –

(i) the numerator of which is the total amount required to be contributed by the employer under the plan for the last 5 plan years ending before the withdrawal, and

(ii) the denominator of which is the total amount contributed under the plan by all employers for the last 5 plan years ending before the withdrawal, increased by any employer contributions owed with respect to earlier periods which were collected in those plan years, and decreased by any amount contributed to the plan during those plan years by employers who withdrew from the plan under this section during those plan years.

(4)(A) The amount of the unfunded vested benefits allocable to an employer under this paragraph is equal to the sum of –

(i) the plan's unfunded vested benefits which are attributable to participants' service with the employer (determined as of the end of the plan year preceding the plan year in which the employer withdraws), and

(ii) the employer's proportional share of any unfunded vested benefits which are not attributable to service with the employer or other employers who are obligated to contrib-

ute under the plan in the plan year preceding the plan year in which the employer withdraws (determined as of the end of the plan year preceding the plan year in which the employer withdraws).

(B) The plan's unfunded vested benefits which are attributable to participants' service with the employer is the amount equal to the value of nonforfeitable benefits under the plan which are attributable to participants' service with such employer (determined under plan rules not inconsistent with regulations of the corporation) decreased by the share of plan assets determined under subparagraph (C) which is allocated to the employer as provided under subparagraph (D).

(C) The value of plan assets determined under this subparagraph is the value of plan assets allocated to nonforfeitable benefits which are attributable to service with the employers who have an obligation to contribute under the plan in the plan year preceding the plan year in which the employer withdraws, which is determined by multiplying -

(i) the value of the plan assets as of the end of the plan year preceding the plan year in which the employer withdraws, by

(ii) a fraction -

(I) the numerator of which is the value of nonforfeitable benefits which are attributable to service with such employers, and

(II) the denominator of which is the value of all nonforfeitable benefits under the plan

as of the end of the plan year.

(D) The share of plan assets, determined under subparagraph (C), which is allocated to the employer shall be determined in accordance with one of the following methods which shall be adopted by the plan by amendment:

(i) by multiplying the value of plan assets determined under subparagraph (C) by a fraction –

(I) the numerator of which is the value of the nonforfeitable benefits which are attributable to service with the employer, and

(II) the denominator of which is the value of the nonforfeitable benefits which are attributable to service with all employers who have an obligation to contribute under the plan in the plan year preceding the plan year in which the employer withdraws;

(ii) by multiplying the value of plan assets determined under subparagraph (C) by a fraction –

(I) the numerator of which is the sum of all contributions (accumulated with interest) which have been made to the plan by the employer for the plan year preceding the plan year in which the employer withdraws and all preceding plan years; and

(II) the denominator of which is the sum of all contributions (accumulated with interest) which have been made to the plan (for the plan year preceding the plan year in which the employer withdraws and all preceding plan years) by all employers who have an obligation to contribute to the plan for the plan year preceding the plan year in which the employer withdraws; or

(iii) by multiplying the value of plan assets under subparagraph (C) by a fraction –

(I) the numerator of which is the amount determined under clause (ii)(I) of this subparagraph, less the sum of benefit payments (accumulated with interest) made to participants (and their beneficiaries) for the plan years described in such clause (ii)(I) which are attributable to service with the employer; and

(II) the denominator of which is the amount determined under clause (ii)(II) of this subparagraph, reduced by the sum of benefit payments (accumulated with interest) made to participants (and their beneficiaires) for the plan years described in such clause (ii)(II) which are attributable to service with respect to the employers described in such clause (ii)(II).

(E) The amount of the plan's unfunded vested benefits for a plan year preceding the plan year in which an employer withdraws, which is not attributable to service with employers who have an obligation to contribute under the plan in the plan year preceding the plan year in which such employer withdraws, is equal to -

(i) an amount equal to -

(I) the value of all nonforfeitable benefits under the plan at the end of such plan year, reduced by

(II) the value of nonforfeitable benefits under the plan at the end of such plan year which are attributable to participants' service with employers who have an obligation to contribute under the plan for such plan year; reduced by

(ii) an amount equal to -

(I) the value of the plan assets as of the end of such plan year, reduced by

(II) the value of plan assets as of the end of such plan year as determined under subparagraph (C); reduced by

(iii) the value of all outstanding claims for withdrawal liability which can reasonably be expected to be collected with respect to employers withdrawing before the year preceding the plan year in which the employer withdraws.

(F) The employer's proportional share described in subparagraph (A)(ii) for a plan year is the amount determined under

subparagraph (E) for the employer, but not in excess of an amount which bears the same ratio to the sum of the amounts determined under subparagraph (E) for all employers under the plan as the amount determined under subparagraph (C) for the employer bears to the sum of the amounts determined under subparagraph (C) for all employers under the plan.

(G) The corporation may prescribe by regulation other methods which a plan may adopt for allocating assets to determine the amount of the unfunded vested benefits attributable to service with the employer and to determine the employer's share of unfunded vested benefits not attributable to service with employers who have an obligation to contribute under the plan in the plan year in which the employer withdraws.

(5)(A) The corporation shall prescribe by regulation a procedure by which a plan may, by amendment, adopt any other alternative method of determining an employer's allocable share of unfunded vested benefits under this section, subject to the approval of the corporation based on its determination that adoption of the method by the plan would not significantly increase the risk of loss to plan participants and beneficiaries or to the corporation.

(B) The corporation may prescribe by regulation standard approaches for alternative methods, other than those set forth in the preceding paragraphs of this subsection, which a plan may adopt under subparagraph (A), for which the corporation may waive or modify the approval requirements of subparagraph (A). Any alternative method shall provide for the allocation of substantially all of a plan's unfunded vested benefits among employers who have an obligation to contribute under the plan.

(C) Unless the corporation by regulation provides otherwise, a plan may be amended to provide that a period of more than 5 but not more than 10 plan years may be used for determining the numerator and denominator of any fraction which is used

under any method authorized under this section for determining an employer's allocable share of unfunded vested benefits under this section.

(D) The corporation may by regulation permit adjustments in any denominator under this section, consistent with the purposes of this title, where such adjustment would be appropriate to ease administrative burdens of plan sponsors in calculating such denominators.

(d) Method of calculating allocable share of employer of unfunded vested benefits set forth in subsection (c)(3) of this section; applicability of certain statutory provisions. (1) The method of calculating an employer's alllocable share of unfunded vested benefits set forth in subsection (c)(3) shall be the method for calculating an employer's allocable share of unfunded vested benefits under a plan to which section 404(c) of the Internal Revenue Code of 1954 [26 USCS § 404(c)], or a continuation of such a plan, applies, unless the plan is amended to adopt another method authorized under subsection (b) or (c).

(2) Sections 4204, 4209, 4219(c)(1)(B), and 4225 [29 USCS §§ 1384, 1389, 1399(c)(1)(B), and 1405] shall not apply with respect to the withdrawal of an employer from a plan described in paragraph (1) unless the plan is amended to provide that any of such sections apply.

(e) Reduction of liability of withdrawn employer in case of transfer of liabilities to another plan incident to withdrawal or partial withdrawal of employer. In the case of a transfer of liabilities to another plan incident to an employer's withdrawal or partial withdrawal, the withdrawn employer's liability under this part [29 USCS §§ 1381 et seq.] shall be reduced in an amount equal to the value, as of the end of the last plan year ending on or before the date of withdrawal, of the transferred unfunded vested benefits.

(f) Computations applicable in case of withdrawal following

merger of multiemployer plans. In the case of a withdrawal following a merger of multiemployer plans, subsection (b), (c), or (d) shall be applied in accordance with regulations prescribed by the corporation; except that, if a withdrawal occurs in the first plan year beginning after a merger of multiemployer plans, the determination under this section shall be made as if each of the multiemployer plans had remained separate plans.

29 U.S.C. §1393:

(a) Use by plan actuary in determining unfunded vested benefits of a plan for computing withdrawal liability of employer. The corporation may prescribe by regulation actuarial assumptions which may be used by a plan actuary in determining the unfunded vested benefits of a plan for purposes of determining an employer's withdrawal liability under this part. Withdrawal liability under this part shall be determined by each plan on the basis of –

(1) actuarial assumptions and methods which, in the aggregate, are reasonable (taking into account the experience of the plan and reasonable expectations) and which, in combination, offer the actuary's best estimate of anticipated experience under the plan, or

(2) actuarial assumptions and methods set forth in the corporation's regulations for purposes of determining an employer's withdrawal liability.

(b) Factors determinative of unfunded vested benefits of plan for computing withdrawal liability of employer. In determining the unfunded vested benefits of a plan for purposes of determining an employer's withdrawal liability under this part, the plan actuary may –

(1) rely on the most recent complete actuarial valuation used for purposes of section 412 of the Internal Revenue Code of 1954 [26 USCS § 412] and reasonable estimates for the interim years of the unfunded vested benefits, and

(2) in the absence of complete data, rely on the data available or on data secured by a sampling which can reasonably be expected to be representative of the status of the entire plan.

(c) Determination of amount of unfunded vested benefits. For purposes of this part, the term "unfunded vested benefits" means with respect to a plan, an amount equal to –

(A) the value of nonforfeitable benefits under the plan, less

(B) the value of the assets of the plan.

29 U.S.C. §1399(c)(2):

(2) Withdrawal liability shall be payable in accordance with the schedule set forth by the plan sponsor under subsection (b)(1) beginning no later than 60 days after the date of the demand notwithstanding any request for review or appeal of determinations of the amount of such liability or of the schedule.

29 U.S.C. §1399(c)(5):

(5) In the event of a default, a plan sponsor may require immediate payment of the outstanding amount of an employer's withdrawal liability, plus accrued interest on the total outstanding liability from the due date of the first payment which was not timely made. For purposes of this section, the term "default" means –

(A) the failure of an employer to make, when due, any payment under this section, if the failure is not cured within 60 days after the employer receives written notification from the plan sponsor of such failure, and

(B) any other event defined in rules adopted by the plan which indicates a substantial likelihood that an employer will be unable to pay its withdrawal liability.

29 U.S.C. §1401:

(a) Arbitration proceedings; matters subject to arbitration, procedures applicable, etc. (1) Any dispute between an employer and the plan sponsor of a multiemployer plan concerning a determination made under sections 4201 through 4219 [29 USCS §§ 1381-1399] shall be resolved through arbitration. Either party may initiate the arbitration proceeding within a 60-day period after the earlier of -

(A) the date of notification to the employer under section 4219(b)(2)(B) [29 USCS § 1399(b)(2)(B)], or

(B) 120 days after the date of the employer's request under section 4219(b)(2)(A) [29 USCS § 1399(b)(2)(A)].

The parties may jointly initiate arbitration within the 180-day period after the date of the plan sponsor's demand under section 4219(b)(1) [29 USCS § 1399(b)(1)].

(2) An arbitration proceeding under this section shall be conducted in accordance with fair and equitable procedures to be promulgated by the corporation. The plan sponsor may purchase insurance to cover potential liability of the arbitrator. If the parties have not provided for the costs of the arbitration, including arbitrator's fees, by agreement, the arbitrator shall assess such fees. The arbitrator may also award reasonable attorney's fees.

(3)(A) For purposes of any proceeding under this section, any determination made by a plan sponsor under sections 4201 through 4219 and section 4225 [29 USCS §§ 1381-1399 and 1405] is presumed correct unless the party contesting the determination shows by a preponderance of the evidence that the determination was unreasonable or clearly erroneous.

(B) In the case of the determination of a plan's unfunded vested benefits for a plan year, the determination is presumed correct unless a party contesting the determination shows by a preponderance of evidence that -

(i) the actuarial assumptions and methods used in the determination were, in the aggregate, unreasonable (taking into account the experience of the plan and reasonable expectations), or

(ii) the plan's actuary made a significant error in applying the actuarial assumptions or methods.

(b) Alternative collection proceedings; civil action subsequent to arbitration award; conduct of arbitration proceedings. (1) If no arbitration proceeding has been initiated pursuant to subsection (a), the amounts demanded by the plan sponsor under section 4219(b)(1) [29 USCS § 1399(b)(1)] shall be due and owing on the schedule set forth by the plan sponsor. The plan sponsor may bring an action in a State or Federal court of competent jurisdiction for collection.

(2) Upon completion of the arbitration proceedings in favor of one of the parties, any party thereto may bring an action, no later than 30 days after the issuance of an arbitrator's award, in an appropriate United States district court in accordance with section 4301 [29 USCS § 1451] to enforce, vacate, or modify the arbitrator's award.

(3) Any arbitration proceedings under this section shall, to the extent consistent with this title, be conducted in the same manner, subject to the same limitations, carried out with the same powers (including subpena power), and enforced in United States courts as an arbitration proceeding carried out under title 9, United States Code [9 USCS §§ 1 et seq.].

(c) Presumption respecting finding of fact by arbitrator. In any proceeding under subsection (b), there shall be a presumption, rebuttable only by a clear preponderance of the evidence, that the findings of fact made by the arbitrator were correct.

(d) Payments by employer prior and subsequent to determination by arbitrator; adjustments; failure of employer to make payments. Payments shall be made by an employer in accordance

with the determinations made under this part [29 USCS §§ 1381 et seq.] until the arbitrator issues a final decision with respect to the determination submitted for arbitration, with any necessary adjustments in subsequent payments for overpayments or underpayments arising out of the decision of the arbitrator with respect to the determination. If the employer fails to make timely payment in accordance with such final decision, the employer shall be treated as being delinquent in the making of a contribution required under the plan (within the meaning of section 515) [29 USCS § 1145].

29 U.S.C. §1461(e)(2):

(2)(A) Except as provided in this paragraph, part 1 of subtitle E [29 USCS §§ 1381 et seq.], relating to withdrawal liability, takes effect on April 29, 1980.

(B) For purposes of determining withdrawal liability under part 1 of subtitle E [29 USCS §§ 1381 et seq.], an employer who has withdrawn from a plan shall be considered to have withdrawn from a multiemployer plan if, at the time of the withdrawal, the plan was a multiemployer plan as defined in section 4001(a)(3) [29 USCS § 1301(a)(3)] as in effect at the time of the withdrawal.